Abstract

V 51 #1

(70)

51 I.A.2 70

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No 10548 Agenda No. 6

Marzell Curie, Plaintiff-Appellant, v. Earl Conover and Gerald Emlow and Richard Tolly, Individually and as Co-Partners, d/b/a Southeast Shell Service Station, a Co-Partnership, Defendants-Appellees.	Appeal from the Circuit Court of Macon County

SPIVEY, J.

The Circuit Court of Macon County granted the defendants' post trial motion and entered judgment in favor of the defendants notwithstanding the failure of the jury to reach a verdict in this cause. Plaintiff, Marzell Currie, had sued Gerald Emlow and Richard Tolly, partners doing business as Southeast Shell Service Station, for personal injuries he sustained as the result of claimed negligence of the partners. The cause was submitted to a jury and it failed to agree.

The facts are relatively simple. Currie was employed as a dump truck driver. On November 22, 1960, the hydraulic mechanism that was responsible for dumping the truck broke while

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Currie was unloading his truck. Currie's employer instructed him to take the truck to the defendants' station for repairs, and this was done. The bed on the truck was made of steel and quite heavy. It rested on the frame of the truck and was allowed to move up and down by reason of a hinge type mechanism powered by the hydraulic lift.

In order for the defendants to get to the hydraulic mechanism to accomplish repairs, it was necessary that the bed of the truck be raised.

The defendant Enlow and Currie attempted to lift the bed and place a jack under the bed so that the bed could be raised. They were not able to lift the bed and so called Enlow's partner Tolly and an employee, Conover, to help raise the bed by the use of the principle of the lever and fulcrum. The bed was thus raised to such a height that Enlow and Currie were able to place a screw jack under the bed and then Currie and Enlow raised the bed with the jack.

When the bed was raised to a sufficient height Currie placed a piece of a railroad tie on the frame of the truck between the frame of the truck and the frame of the bed. Enlow testified that he had no conversation with Currie concerning what to do in raising the truck bed, so the fair inference is that Currie placed the block between the frames of his own volition.

Likewise, Enlow testified that "Usually it (the bed) can't come down if you block it."

The evidence showed that the block used was wet and there was a dispute as to whether the block was slick. There was no question but that the truck was damp and muddy and that there had been some rain that day.

Enlow also testified that during the process of raising the bed, the jack had not popped out. Currie stated that when the bed was raised, Enlow asked "Would I catch hold of the piston what go down to the cylinder." He testified that he bent over to do as he was requested and that was the last he remembered. Enlow stated that Currie leaned over the frame of the truck and at that instant the block popped out and the truck bed fell and caught Currie. Currie sustained serious injuries. Enlow denied asking Currie to check any part of the hydraulic mechanism and claimed he did not request Currie to look in under the bed. He admitted that he, Enlow, did look in to see what tools he would need to repair the truck. According to Enlow, he was leaning in on one side of the truck and Currie was leaning in on the other side when he noticed the block start to fall. He said he yelled at Currie and got himself out from under the bed.

The trial court ruled that the plaintiff was guilty of contributory negligence as a matter of law, and for this reason

alone granted the defendants' post trial motion. Thus, we have only the one narrow question presented for review. That is, was there any evidence, taken with its intendments most favorable to the plaintiff, which tended to show that the plaintiff was in the exercise of ordinary care for his own safety? If so, then the issue of ordinary care was a question of fact for the jury, and the court erred in allowing the post trial motion. "A motion for directed verdict or for judgment notwithstanding the verdict presents the single question whether there is in the record any evidence which standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case." Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E. 2d. 847. "Contributory negligence on the part of a plaintiff is a matter of fact for the jury to determine, and it becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence." Pinkerton v. Oak Park Nat. Bank, 16 Ill. App. 2d. 91, 147 N.E. 2d. 390.

We are of the opinion that there was such evidence and that the judgment of the court was erroneous.

According to the evidence, Currie blocked the bed of the truck after it was jacked up into position where Enlow could work on it.

This he apparently did as a matter of caution without being requested so to do. When the bed was blocked, it usually couldn't come down, according to the testimony of Enlow. We know now that the bed did come down, but the happening of an injury must not be considered as proof of contributory negligence just as it does not prove negligence. Enlow, an experienced mechanic, looked in to see what tools he needed when the bed was blocked, We are not prepared to say that Currie did not act as a reasonably careful person under these circumstances when he looked in at the request of Enlow. The mud on the frame, the fact that the block was wet and Currie's part in this situation are facts which may or not cause a jury to find Currie contributorily negligent. In any event, the evidence offered, considering it most favorably for Currie, as we must, was sufficient to make a prima facia case of due care and the court erred in granting the defendants' post trial motion. "The law does not require that a plaintiff be a prophet, but only that he exercise the care of an ordinary careful person." Hinrichs v. Gumaw, 41 Ill. App. 2d. 428, 190 N.E. 2d. 610.

The judgment of the Circuit Court of Macon County, granting defendants' post trial motion, is therefore reversed and the cause is remanded to the Circuit Court of Macon County for a new trial.

Reversed and remanded.

Crow, P. J., and Smith, J., concur.

Crow, P. J., and Smith, J., concur.

51 #1 (91)

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

A

Gen. No. 10525

51 I.A.2 91

VANNETTA ECHTERNKAMP, a/k/a
VANETTA YORK,
Appellee,
vs.
CARL W. ECHTERNKAMP and GEM CITY BUILDING AND LOAN ASSOCIATION, an Illinois Corporation,
Appellants.

Appeal from the
Circuit Court of
Adams County.

PER CURIAM:

This is a complaint for partition by the plaintiff Vannetta Echternkamp, who alleges she and the defendant Carl W. Echternkamp are the owners of certain real estate as joint tenants, they having purchased it February 3, 1953 by a deed to them as joint tenants, that she and that defendant executed a mortgage thereon to the other defendant Gem City Building and Loan Association, that she signed the mortgage note to that other defendant, that she paid part of the closing costs, paid part on the mortgage note, and paid part on the repairs and upkeep of the improvements on the real estate. The defendant Carl W. Echternkamp contends in his answer and counterclaim that he has paid for the real estate out of his own money, that the plaintiff has paid no part thereof, and that he is entitled to a resulting trust in the real estate. The cause was referred to a Special Master, evidence was taken, and his Report and Supplement thereto found that the plaintiff and the defendant Carl W. Echternkamp

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(1P)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Gen. No. 10139

VANDETTA MINING COMP., a/k/a
VANETTA TOOL,

Appellee,

vs.

JACK W. BOTTERSWORTH and CHE DIV MINING
AND LOAN ASSOCIATION, an Illinois
Corporation,

Appellants.

Appeal from the
Circuit Court of
Adams County.

PER CURIAM:

This is a complaint for partition by the plaintiff Vanetta Botterswamp, who alleges she and the defendant Carl W. Botterswamp are the owners of certain real estate as joint tenants, they having purchased it February 3, 1953 by a deed in them as joint tenants, that she and that defendant executed a mortgage thereon to the other defendant One City Building and Loan Association, that she signed the mortgage note to that other defendant, that she paid part of the closing costs, paid part on the mortgage note, and paid part on the repairs and upkeep of the improvements on the real estate. The defendant Carl W. Botterswamp answered in his answer and counterclaim that he has paid for the real estate out of his own money, that the plaintiff has paid no part thereof, and that he is entitled to a resulting trust in the real estate. The cause was referred to a Special Master, evidence was taken, and his report and Supplement thereto found that the plaintiff and the defendant Carl W. Botterswamp

were the owners in fee simple as joint tenants of the real estate concerned, it is the only real estate they own together, they each have an undivided one-half interest, the equities are with the plaintiff, she is entitled to partition, and recommended a decree of partition, and found that no resulting trust was established. The defendant Carl W. Echternkamp filed objections thereto, involving questions of fact and law, which were overruled, and filed exceptions thereto, which were overruled, and an Order was entered September 23, 1963 approving the Special Master's Report, with one immaterial qualification. The defendant-appellant's theory is that he having paid the purchase price, the taxes, and made valuable improvements, and the plaintiff having paid no part thereof, he is entitled to a resulting trust in the real estate, the title should be quieted in him, and the plaintiff should be decreed to have no interest in the real estate. The plaintiff-appellee's theory is that she, having taken title as a joint tenant, having paid part of the purchase price, having paid part of the mortgage debt, and having paid for part of the improvements, is entitled to partition as a one-half owner, and since she and the defendant pooled their earnings and paid together on the mortgage and household expenses they were joint tenants and each has an undivided one-half interest in the real estate.

The final order or decree from which this appeal was taken was entered September 23, 1963, approving the report of the Special Master, overruling the defendant's exceptions (with one immaterial qualification), finding the plaintiff and the defendant Carl W. Echternkamp to be the owners in fee simple as joint tenants of the real estate

an undivided one-half interest in the real estate.

The final order or decree from which appeal was taken entered September 23, 1961, approved the report of the Special Master, overruling the defendant's exceptions (which are immaterial qualification) finding the plaintiff and the defendant Dent W. Robinson to be the owners in fee simple as joint tenants of the real estate

concerned, that they own no other real estate together, that they each have an undivided one-half interest therein, and decreeing partition.

The defendant Carl W. Echternkamp filed his notice of appeal therefrom on October 16, 1963.

The report of the proceedings at the trial, a part of the record on appeal, was required to be procured by the defendant-appellant, submitted to the trial judge or his successor for his certificate of correctness, or if that is impossible because of the absence from the district, sickness or other disability of the judge, then to any other judge of that court, and filed, duly certified, in the trial court within 50 days after the notice of appeal was filed, unless the time for filing the same was properly extended: SUPREME COURT RULE 36 (1) (c), APPELLATE COURT RULE 1 (1) (c), CH. 110 ILL. REV. STATS., 1963, pars. 101.36, 201.1. December 5, 1963 was 50 days after the notice of appeal was filed, October 16, 1963. No report of the proceedings at the trial was so procured by the defendant-appellant, or so submitted, or so filed, duly certified, in the trial court on or before December 5, 1963.

The entire record on appeal was required to be filed by or at the instance of the defendant-appellant in the reviewing court, - this Appellate Court, - not more than 60 days after the notice of appeal was filed, unless the time for filing the report of proceedings at the trial has been appropriately extended, in which event the time within which the record on appeal must be filed is (without the necessity of an order) extended 10 days beyond the extended time

for filing the report of proceedings, or unless further time within which to file the record on appeal be appropriately granted by the reviewing court, - this Appellate Court, - or any judge thereof in vacation: SUPREME COURT RULE 36 (2) (d) (e), APPELLATE COURT RULE 1 (2) (d) (e). December 15, 1963 (or, that being a Sunday, possibly December 16, 1963) was 60 days after the notice of appeal was filed, October 16, 1963. No record on appeal was so filed by or at the instance of the defendant-appellant in this Court on or before December 15 or 16, 1963.

On January 17, 1964 the record on appeal herein was filed in this Court. It had also been filed the same date in the trial court. Page 290 thereof, the next to last page, is the Circuit Clerk's customary form of certificate to the record. The last page thereof, which is unnumbered, is the customary form of certificate of correctness to the report of proceedings at the trial by the trial judge or his successor. Both certificates are dated January 17, 1964.

Prior to that, on December 5, 1963, the defendant-appellant had filed in this, the Appellate Court, an "Application * * for an Extension of the Time in which to File the Report of the Proceedings at the Trial of the Above Entitled Suit", in which he moved "for an extension of time not to exceed forty-five days in which to file in the Appellate Court for the Third District of the State of Illinois the record or report of the proceedings at the trial of the above entitled suit * * * ", and to which is attached an affidavit of his attorney which, in part, recites that " * * Circuit Judge John T. Reardon, Circuit Judge Robert S. Hunter, and County Judge Richard F.

Scholz, are not, and will not be, in the City of Quincy, in Adams County, Illinois, at any time on this 5th day of December, A. D. 1963". At the bottom of the original of that "application" is endorsed an Order of December 9, 1963 by a Judge of this Court "Motion allowed and time extended to and including January 19, 1964".

On application made before the expiration of the original or extended period allowed for filing the report of proceedings at the trial, any judge of the trial court might on good cause shown have extended the time for filing such report of proceedings, such extension or extensions in the trial court not to exceed in the aggregate 45 days from the last day fixed for filing such: SUPREME COURT RULE 36 (1) (c), APPELLATE COURT RULE 1 (1) (c). No such application was made by the defendant-appellant in the trial court, and no such extension of time was granted by the trial court for filing the report of proceedings at the trial. The reviewing court, - this Appellate Court, - or a Judge thereof in vacation, may grant further extensions of time for filing such report upon application made within the extended period granted by the judge of the trial court, or within any further extended period granted by the reviewing court or judge thereof, and in the manner provided in subdivision (2) (e) of the Rule. No extended period for filing such having in the first instance ever been granted by the judge of the trial court, - or even applied for, - the Appellate Court, or a judge thereof in vacation, could not as an original matter, grant an extension of time for such. Further, where action on the part of the reviewing court is sought before the record on appeal is filed, as was the case here,

the party seeking relief must file with his application an appropriate short record: SUPREME COURT RULE 36 (2) (b), APPELLATE COURT RULE 1 (2) (b). No short record was filed by the defendant-appellant with his application of December 5, 1963.

Further time within which the entire record on appeal may be filed (in addition to the automatic 10 days beyond the extended time for filing the report of proceedings if the time for filing the report of proceedings is extended) may be granted by this Court, or any Judge thereof in vacation, upon motion and affidavit showing good cause and due diligence, but the motion must be accompanied by a short record: SUPREME COURT RULE 36 (2) (e), APPELLATE COURT RULE 1 (2) (e). We do not believe the "application" of the defendant-appellant of December 5, 1963 was intended to be a motion for an extension of time within which the entire record on appeal might be filed, but related rather to the report of proceedings at the trial, but in any event it was not accompanied by a short record and the defendant-appellant did not thereby furnish a sufficient basis under the rules for calling upon this Court for any action.

The non-compliance with the Rules by the defendant-appellant induced the inadvertent and ineffective Order of December 9, 1963 of this Court.

No report of the proceedings at the trial having been procured by the defendant-appellant, submitted to the trial judge, or his successor, and filed, duly certified, in the trial court on or before December 5, 1963, and there being no effective extension of the time for doing so in accordance with Supreme Court Rule 36 and

Appellate Court Rule 1, no record on appeal having been filed by or at the instance of the defendant-appellant in this Court on or before December 15 or 16, 1963, and there being no effective extension of time for doing so, in accordance with those Rules, we are required to dismiss the appeal, and it is accordingly dismissed. See: LUKAS v. LUKAS (1943) 381 Ill. 429; MATHES v. WILLIAM BARR LUMBER CO. et al. (1928) 248 Ill. App. 160; PEOPLE etc. v. LONDON etc. CO. (1938) 295 Ill. App. 581; ZANTER v. TODD (1944) 322 Ill. App. 72.

APPEAL DISMISSED.

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(96)

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51 I.A.2 96

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 66, WINNEBAGO COUNTY, ILLINOIS, Plaintiff-Appellee, vs. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 205, WINNEBAGO COUNTY, ILLINOIS, Defendant-Appellant, and COUNTY BOARD OF SCHOOL TRUSTEES OF WINNEBAGO COUNTY, ILLINOIS, Defendants.	Appeal from the Circuit Court of Winnebago County

ABRAHAMSON, P. J.

School District No. 205 (hereinafter referred to as the Rockford District), maintaining Grades 1-12 and kindergarten, situated within the City of Rockford, Illinois, is a special charter district, and School District No. 66 (hereinafter referred to as Whig Hill District), is a grade school district and adjoins the Rockford District on its northwesterly border, maintaining kindergarten through 8th grade.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 96, WINNEBAGO COUNTY, ILLINOIS,

Plaintiff-Appellee,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 205, WINNEBAGO COUNTY, ILLINOIS,

Defendant-Appellant,

and

COUNTY BOARD OF SCHOOL TRUSTEES OF WINNEBAGO COUNTY, ILLINOIS,

Defendants.

Appeal from the Circuit Court of Winnebago County.

ABRAHAMSON, P. J.

School District No. 205 (hereinafter referred to as the Rockford District), maintaining Grades 1-12 and kindergarten, situated within the City of Rockford, Illinois, is a special charter district, and School District No. 96 (hereinafter referred to as Hall District), is a grade school district and adjoins the Rockford District on its northwesterly border, maintaining kindergarten through 8th grade.

In keeping with the provisions of Section 7-2.1 of the School Code, (Ill. Rev. Stats. 1961, Chap. 122, Sec. 7-2.1), a petition was filed by two-thirds of the legal voters residing within the Whig Hill District with the Superintendent of Public Instruction, the Rockford District and the County Board of School Trustees of Winnebago County, Illinois, in which the petitioners sought the annexation of the Whig Hill District to the Rockford District.

A hearing was conducted, at which both districts introduced oral and documentary evidence in support of their respective positions. On January 28, 1963, the Rockford District adopted a resolution denying the petition, and on February 5, 1963, the County Board of School Trustees entered an order granting the petition.

Thereafter, the Whig Hill District filed its complaint in the Circuit Court of Winnebago County seeking administrative review of the action of the Rockford District, and, on August 6, 1963, that Court decreed the resolution of the Rockford District to be against the manifest weight of the evidence, and ordered that the Whig Hill District be annexed and made a part of the Rockford District.

The Rockford District has perfected this appeal, raising several contentions but fundamentally assailing only the timeliness, as opposed to the necessity, of the annexation, as the following quotation from its brief will demonstrate:

> It is very apparent from the evidence that plaintiff's Whig Hill School District is in difficult straits financially, and that the present level of education within the district is

endangered.

> Any further cutback in basic program would jeopardize recognition status and the right to receive state aid. This financial difficulty is not only current (which might be alleviated temporarily as will be hereinafter suggested), but also permanent. As is pointed out by Mr. C. Allan Fort, Director of Finances, the per pupil wealth of the Whig Hill District is simply not sufficient to support a good educational program and the only permanent solution that can be found is through a larger and more substantial district.
>
> That 'larger and more substantial district' must of necessity be the Rockford School District, or some future district embracing the large assessed valuation of that district. This much is admitted.
>
> However, the fact that the Whig Hill District must, for the benefit of its pupils, become a part of the Rockford District as a permanent solution does not require the conclusion that such annexation should occur <u>now</u>;***

After making these admissions, the Rockford District urges that instead of annexation at this time, the better strategy would be for the Whig Hill District to take steps leading to a more complete exhaustion of its financial resources, so that the Rockford District would have an opportunity to secure increases in its tax structure by referenda, at which time it would be more appropriate for the Whig Hill District to be annexed. This contention, while not frequently advanced, is permitted by the provisions of the cited section of the School Code, which provides that any proposed annexation or disconnection may be delayed or suspended for a stated period with respect to any or all of the territory affected.

Our function as a court of review is to determine if the findings and resolution made by the Rockford District are

against the manifest weight of the evidence, and in view of the posture of this case will be confined to the timeliness, as distinguished from the necessity, of the annexation in question. School Directors of School District No. 82, etc., et al, vs. Wolever, et al, (1962) 34 Ill. App. 2nd 95, 180 N. E. 2d 345.

In determining whether or not this resolution was against the manifest weight of the evidence we are obliged to consider the public interest and the welfare of the districts and persons involved, including, of course, the educational welfare of the pupils of both districts.

Mr. Lee Thomas, a certified public accountant employed by the Whig Hill District, testified to the financial condition of that district, to its operation with a continuing deficit, and expressed his opinion to be that the best course of action for that district to follow to rectify its financial position would be to pursue a course leading to annexation, and that this would promote the best interests of the schools.

Mr. Kenneth Smith, Superintendent of the Whig Hill District, testified that between the year 1952 and the time of the administrative hearing twenty piecemeal disconnections from the Whig Hill District and annexations to the Rockford District occurred, which depleted the territory, but, more importantly, the income of the district, without a corresponding decrease in the student enrollment. The district had been informed that its state recognition for the purposes of state aid would be jeopardized by any reductions in the costs of their operation, inview of the fact that they were operating on a minimum basis at that time, and because of the district's

situation, it would be impossible for it to improve its program above the standards then existing.

He further testified that the Whig Hill District had an annual deficit in its educational fund, (in the year 1960 it had expenditures of $347,000 and a $100,000 deficit), and even if the educational tax rate of the district were increased to the maximum legally possible, the district would still have to operate at a continuing deficit.

Mr. Kenneth L. Orton, Assistant Superintendent of the Rockford District, testified to the failure of four referenda out of five to secure increases in that district's tax structure, and in order for it to conduct the same quality program would require an increase in the neighborhood of $.27, assuming that the annexation did not take place. If the annexation did take place the tax increase needed would be $.30, rather than $.27, both of which are within the maximum tax structure permitted by law.

After considering the entire record in this cause, with special emphasis upon the best interests of the districts and the educational welfare of the student population, it is our conclusion that the resolution of the Rockford District was not supported by adequate evidence and was contrary to the manifest weight of the evidence.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

CARROLL, J. and MORAN, J. concur.

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(51 I.A.2102)

GEN. NO. 64-F-32 AGENDA NO. 32.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EDWARD A. NARUP and PAULA NARUP, Plaintiffs-Appellees, -vs- ROBERT L. HIGGINS, Defendant-Appellant.	APPEAL FROM THE CITY COURT OF ALTON, ILLINOIS.

DOVE, P.J.

This is an appeal by the defendant from a judgment rendered against him in favor of the plaintiffs for $2549.36, by the City Court of the City of Alton.

Count one of this complaint alleges that defendant, on or about April 4, 1961, entered into a written agreement with plaintiffs by the provisions of which defendant agreed to convey to plaintiff the property known as No. 1 Rock Springs Drive in Alton, Illinois, in consideration of the payment by plaintiffs to defendant of $28,500.00; that the plaintiffs have performed all the conditions of the agreement on their part, but that defendant has failed to perform his obligation in that (1) "he has

not installed an adequate air conditioning unit for said home; (2) that said house was not properly and adequately roofed so as to make it water-tight, and (3) that he has failed to complete the grading and excavating and filling of the yard surrounding said home."

Count two alleged that on or about April 4, 1961, defendant represented to plaintiffs that the house which plaintiffs subsequently purchased from defendant was properly air conditioned and that the roof of the house was properly constructed so as to prevent water from leaking into said house. It is then alleged that these representations were false, known to defendant to be false, and made with the intention to deceive and defraud plaintiffs and to induce them to purchase the premises described in count one. It was further alleged that plaintiffs believed these representations, relied upon them, and were damaged in the sum of $8000.00.

The answer of the defendant admitted the execution of the contract and that plaintiffs had performed their obligations in connection therewith, but denied the other allegations of count one, and denied all of the charges of fraud and misrepresentation.

The evidence discloses that the defendant is a resident of Godfrey, Illinois, and for twelve years has been a general building contractor. He testified that there is a hill to the rear of No. 1 Rock Spring Drive, and approximately a thirty-foot slope from this hill to the street; that it took consider-

able excavating of the hill in order to form the lot upon which defendant constructed the dwelling at No. 1 Rock Spring Drive, and that this lot is approximately 100 feet wide and between 100 and 120 feet deep. The defendant further testified that in March, 1960, he commenced the erection of the house upon this lot, and that, by the middle of the summer of 1960, the house had been roofed, plastered, the hardwood flooring laid, and the plumbing fixtures and cabinets installed. The lot had been graded and seeded, and the driveway poured. In June, 1960, a tree damaged a section of the roof which the defendant testified he repaired by replacing the necessary sheeting board, felt and roofing. In April or the early part of May, 1961, the defendant installed a heavy duty two-ton air conditioning unit similar to the one he had in his own residence, and which he testified would satisfactorily condition this home.

Plaintiffs testified that prior to March 11, 1961, they had inspected this property on several occasions, having had all their dealings with John Jay Dick, an insurance and real estate broker of Alton, who represented the defendant, who was the owner and builder of this property. On March 11, 1961, the plaintiffs signed the following instrument, viz:

ALTON-WOOD RIVER AREA BOARD OF REALTORS
UNIFORM SALES AGREEMENT
BETWEEN

RECEIVED OF EDWARD A. AND PAULA NARUP, Buyers, ($500.00), Five Hundred Dollars & no/100 EARNEST MONEY, as an OFFER TO PURCHASE the following described real estate: #1 Rock Spring Drive, Alton, Illinois, for the sum of $28,500.00. Terms: Based on the purchase of Buyers home

located at 2452 Alby St. for the sum of $18,500.00, by Robert L. Higgins and that #1 Rock Spring Drive is completed within 30 days from this date, including installation of range hood, painting dining ceiling and repairing dining room floor, and other miscellaneous finish work. Upon acceptance of the terms contained herein by the Seller, the earnest money shall be applied as part payment on the purchase price. If this offer is rejected by the Seller, or if the title to said premises is not merchantable or cannot be made so within 60 days after written notice is delivered to the seller stating its defects, then this Contract shall be null and void and the earnest money herein receipted for shall be refunded to the Purchaser, who shall have no further claim against the owner. If this sale is not consummated within 60 days from the date of the Agreement because of neglect or failure on the part of the Purchaser to comply with the terms and conditions herein agreed to, then all earnest money shall be forfeited to the Real Estate Agency handling this transaction, as liquidated damages; and this Contract or Agreement shall then be of no further binding effect. The Property is to be conveyed by good and sufficient Warranty Deed and an Abstract showing merchantable title free and clear of all liens and encumbrances, with these exceptions: NONE. The Seller will maintain fire and extended coverage insurance on said property in at least the amount of - Current Amount - until Warranty Deed is delivered. The property taxes shall be pro-rated as of the date of closing.

Possession shall be given within 30 days provided all payments then due shall be fully paid.

Time is the essence of this Agreement.

Dated: 3/11/1961.

Receipted for: John Jay Dick Realty Co.
By: Robert H. Hardwick.

We, the buyers, hereby agree to purchase the above described property on the terms stated above, and agree to pay the price of $28,500.00 for said property.

Dated: 3/11/1961. /s/ EDWARD A. NARUP, buyer.
/s/ PAULA NARUP, buyer.

I, the owner, hereby approve the above sales agreement and agree to sell the above described real estate for $28,500.00.

Dated:_____. Accepted:_____, owner.

The plaintiffs, after signing this instrument, delivered it to the real estate broker, and thereafter, on April 4, 1961, the defendant evidenced his acceptance thereof by affixing his signature thereto. On April 15, 1961, the plaintiffs met the defendant for the first time, and thereafter, but prior to May 10, 1961, defendant installed the range hood and painted the ceiling and repaired the floor of the dining room, as indicated in the agreement. At the trial, Edward A. Narup, one of the plaintiffs, testified that "the work specified in the contract was completed by Mr. Higgins to my satisfaction." On May 12, 1961, the plaintiffs moved into the property, and have continued to live in the house and occupy the premises.

Counsel for plaintiffs state that the theory of the plaintiffs is that the defendant did not complete the dwelling in accordance with the terms of the written contract; that the evidence discloses that the air conditioning unit which defendant installed was not adequate; that plaintiffs expended $1203.00 for a new unit and reroofed the entire house, expending therefor $2646.36, and concludes that the judgment for $2549.36 should be affirmed.

There is no evidence in the record that defendant ever represented to the plaintiffs that the house was properly air conditioned, or that the roof was constructed so that it would not leak. Counsel for appellee does not so contend in their brief and they make no reference to count two of their complaint. Count one avers that the written agreement was

breached in three particulars. First, by defendant's failure to install an adequate air conditioning unit. Second, the house was not properly and adequately roofed. Third, that defendant did not complete the grading and excavating. These several items are not mentioned in the written agreement. The contract does provide that No. 1 Rock Spring Drive shall be "completed within 30 days from this date, including installation of range hood ,painting dining ceiling and repairing dining room floor, and other miscellaneous finish work." The specified range hood was installed and the dining room ceiling was painted, and the dining room floor was repaired, all by the defendant and to the satisfaction of the plaintiffs. On cross-examination of defendant, during the hearing, counsel for plaintiffs inquired of defendant what he considered miscellaneous finish work, and his reply was "a broken door, lock or a piece of trim that is skinned, or a broken window, or a piece of base that is bad, something of a minor nature."

Over the objection of counsel for defendant, the plaintiff, Edward A. Narup, testified that the air conditioning unit which was installed in the house before plaintiffs moved in, did not cool the house to plaintiff's satisfaction, and that on May 21, 1962, plaintiffs exchanged this two-ton compressor unit for a three-ton compressor unit, at an additional cost of $1203.00. There is also evidence that plaintiffs, in March, 1962, expended $561.75 for the construction of a concrete

retaining wall, curb, and addition to the patio, and also expended, on February 21, 1962, $2646.36 for the construction of an entire new roof, and for cutting a hole in the concrete wall for a basement door. It is insisted by counsel for plaintiffs that the phrase "other miscellaneous finish work", used in the contract, is broad enough to include these several amounts. Under all the provisions of the written contract and the competent evidence found in this record, defendant is not liable to reimburse, plaintiffs for their expenditures for any of these items. By the first count of this complaint, plaintiffs sought a judgment against defendant for $4500.00. These several items, for air conditioner, new roof and concrete work, aggregate $4411.11. The trial court rendered judgment for $2549.86. How the trial court arrived at this figure is not explained in the record. It is not sustained by any of the three items of claimed damage, or any combination of such items.

There is no implied warranty of condition or quality in the sale of a new house, or one in the process of construction. "The almost universal rule the country over is that in the sale of a new dwelling, or one in the process of construction, there is no implied warranty on the part of the vendor of fitness, condition or quality. (55 Am. Jur., Vendor and Purchaser, sec. 368; Annotation 78 A.L.R. 2d 446). A leading case in Illinois cited in Am. Jur., supra, is Mercer v. Meinel, 290 Ill. 395, 125 N. E. 288. The basic reason for this

rule is that a deed made in full execution of a contract of sale of land merges the provisions of the contract therein. If not so intended, the parties to the deed may provide to the contrary by written warranties in the deed itself." (Coutrakon v. Adams, 39 Ill. App. 2d 290, 300).

The judgment appealed from finds no support in the evidence, and must be reversed.

Judgment Reversed.

Reynolds, J., concurs.

Wright, J., concurs.

Abstract only.

51 #1

(51)

No. 11890

(51 I.A.2 131)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FRED SINKOVITS,	)	
	)	
Appellee,	)	
	)	
vs.	)	Appeal from the
	)	County Court of
GEORGE PEARAH,	)	DuPage County
Appellant,		

ABRAHAMSON, P. J.

This action originated under the Forcible Entry and Detainer Act in the Justice Court wherein the defendant prevailed. On appeal to the County Court of DuPage County the plaintiff prevailed and defendant brings this appeal.

In January of 1959 the parties hereto, both of whom were practicing physicians, entered into a five year lease by the pertinent terms of which the defendant was to occupy a medical office suite located on the second floor of the Lisle Medical Center which suite contained approximately 518 square feet at a monthly rental of $300 per month. On July 1, 1961, the defendant moved to the first floor of the building to enable the plaintiff to convert the second floor to a hospital. The available space on the first floor was occupied

No. 11956

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FRED SINKOVITS,

Appellee,

vs.

GEORGE FARAH,

Appellant.

ABRAHAMSON, P. J.

This action originated under the Forcible Entry and Detainer Act in the Justice Court wherein the defendant prevailed. On appeal to the County Court of DeKalb County, the plaintiff prevailed and defendant brings this appeal.

In January of 1959 the parties hereto, both of whom were practicing physicians, entered into a five year lease by the pertinent terms of which the defendant was to occupy a medical office suite located on the second floor of the Lisle Medical Center which suite contained approximately 318 square feet at a monthly rental of $200 per month. On July 1, 1961, the defendant moved to the first floor of the building to enable the plaintiff to convert the second floor to a hospital. The available space on the first floor was occupied

by an otologist in a suite designed for his purposes Defendant's quarters consisted of approximately one-half of the size of his original suite and were not designed for the general practice of medicine.

Defendant had requested the rental agent to make an adjustment in the monthly rental and on two occasions discussed with the plaintiff a rental adjustment or reduction to one-half of the original rental, or $150 per month. The evidence fails to disclose that a rent adjustment was ever finalized between the parties. From July 1, 1961, through December of 1962 the defendant paid the sum of $4200 as rental for the first floor quarters and contends that he has overpaid by $1500 the amount due the plaintiff on a basis of $150 per month.

Defendant contends that there is no evidence of any statutory demand for possession pursuant to the Forcible Entry and Detainer Act, Chapter 57, Sections 2 and3, Illinois Revised Statutes, and in the alternative, that there is no evidence that the plaintiff terminated the landlord - tenant relationship between the parties pursuant to Chapter 80, Section 6, Illinois Revised Statutes.

The record fails to disclose that either of these points were submitted to the trial court for determination and for this reason they cannot now for the first time be raised in the reviewing court.

The relief sought by the plaintiff is limited solely to the right of possession. Defendant urges that the trial court failed to determine the rental value of the substituted office space and apply the rent actually paid in order to determine whether or not plaintiff was entitled to possession. Defendant contends that the rental value should be ascertained on the basis of a per square foot area per year predicated on the size of the original office and the monthly rental required in the original lease. That computation would indicate an approximate rental value of $7.00 per square foot per year. Utilizing this method to determine the rental, defendant contends the monthly rental should be ascertained at not more than $175 per month. Under this method of computation defendant's rental would have been paid to the date of the commencement of the action in the Justice Court.

Plaintiff urges that the original lease is in full force and effect and that a substitution of the premises took place by mutual consent and no adjustment of the rent was agreed to or promised, although negiotiations had taken place in this respect from time to time after the move to the first floor.

In view of the defendant's payment of fourteen monthly payments of $300 a month after moving to the first floor quarters, the failure of negiotiations for rent adjustment to be approved and accepted by the plaintiff herein, and the approximate six month arrearage in rent at the com-

mencement of the action in the Justice Court, it would appear that no purpose would be served in the Trial Court making a determination of the rental value of the premises, other than to say that the rental is fixed at $300 per month.

The judgment of the Trial Court is affirmed.

AFFIRMED.

CARROLL, J and MORAN, J., concur.

[illegible]ent if the action in the Justice Court. It would appear that no purpose would be served in the Trial Court making a determination of the total value of the premises, other than to say that the rental is fixed at $300 per month.

The judgment of the Trial Court is affirmed.

APPEARANCES:

CARROLL, J. and MORAN, J., concur.

49571

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v.
DANIEL CARMONE, (Impleaded)
Appellant.

APPEAL FROM
CRIMINAL COURT
COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Criminal Court of Cook County entered on September 26, 1963, finding the defendant, Daniel Carmone, guilty of the crime of receiving stolen property (Ill. Rev. Stat. 1961, c.38, §16-1(d)(1)) in a bench trial and sentencing him to a term of two to four years in the Illinois State Penitentiary.

The sole question upon appeal is whether sufficient evidence was introduced to sustain a finding beyond a reasonable doubt, that the value of the property exceeded $150.00, so that a penitentiary sentence might properly be imposed under section 16-1 of the Criminal Code. (Ill. Rev. Stat. 1961, c.38, §16-1). That section reads inter alia:

"§16-1. Theft

. . . .

Penalty.

. . . . A person convicted of theft of property from the person or exceeding $150.00 in value shall be imprisoned in the penitentiary from one to 10 years."

Approximately $50,000.00 worth of jewelry samples were stolen from the car of David Ellbogen, a jewelry salesman, on April 15, 1963.

The defendant became involved in the case when State's Attorney's police officer Emmett McMorrow came to his apartment to arrest him after having secured information that defendant had

received some of the jewelry taken in the earlier theft. In the apartment Officer McMorrow found a white envelope containing two tie pins, a pair of cuff links, a wrist watch, two rings and chain with a cross worn around defendant's neck.

David Ellbogen identified all the articles found in defendant's apartment as merchandise that was in his car. This identification occurred at the State's Attorney's office on April 24, 1963. At that time all of the items were returned to Mr. Ellbogen with the exception of the two rings which were produced at the trial and marked as People's Exhibit 1 and 2. At the trial Mr. Ellbogen testified that the approximate value of the seven items mentioned above was $160.00. No objection was made to the estimate of Mr. Ellbogen at that time and no other evidence was introduced by the People in reference to the valuation put on the seven items. At the close of the case the court found that there was sufficient evidence to hold defendant for receiving stolen property and that the testimony of Mr. Ellbogen was sufficient to establish the value of the property at $160.00.

The defendant on appeal maintains (1) that the value of the property can only be proven from articles actually introduced into evidence; (2) the testimony of David Ellbogen was insufficient to establish the "fair cash market value at the time and place of the theft."

Five of the seven items upon which the valuation of $160.00 was made were not produced in court. They did not need to be. In People v. Johnston, 382 Ill. 233 (1943), where a conviction for receiving stolen goods was attacked for failure to have the fur coats in court or to give adequate evidence as to the value of the coats, the court stated at 238:

> " . . .The coats had not been recovered and were not present in court, . . .Glasser had made the coats for the owners and had them in his custody for delivery. He described each coat or article and placed them with Fisher for delivery. His knowledge of the property was intimate and based upon facts concerning the ownership. Such testimony cannot be said to be mere conclusions."

And at 240:

> "It is further urged that the evidence as to the value of the property was not sufficient. In People v. Fognini, 374 Ill. 161, this court stated, 'In those types of larceny where the value of the property is material, that value must be alleged and proved, and the proof must show the fair, cash market value at the time and place of the theft.' In the case here the witness Glasser was asked the value of each coat and no objection was interposed at any time to the form of such question. Therefore, the plaintiff in error cannot now question the admissibility of that proof."

For the proposition that the received property need not be present in court to sustain a conviction see People v. Hansen, 28 Ill.2d 322, 340 (1963). See People v. Evans, 23 Ill.2d 302, 304-305 (1961) for the rule that the witness will be presumed to be speaking of market value if no objection is made to the testimony on value.

David Ellbogen, testified without objection that he positively identified the seven items involved, that the items were all in his line of merchandise, and that their value was about $160.00. He was familiar with the merchandise and as a jewelry salesman was qualified to estimate their value. If defendant wished to make an issue as to the value of the jewelry or the ability of Mr. Ellbogen to properly appraise the "fair cash market value at the time of the theft" he should have objected to the testimony. Absent objection or contrary evidence the testimony of a man familiar with the merchandise and experienced in the jewelry business is sufficient to support a finding of value beyond a reasonable doubt. The judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

49477

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

ROBERT WILSON,
Defendant-Appellant.

APPEAL FROM
THE CRIMINAL COURT
OF COOK COUNTY
ILLINOIS

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Defendant Robert Wilson was convicted by a jury of the murder of Joyce Craig and sentenced to life imprisonment. His appeal for review and reversal of his conviction and for a new trial was transferred here by the Supreme Court.

Defendant had been living with Joyce Craig for about nine months. For several weeks prior to the murder they lived in a second-floor apartment above Joyce's parents, Roy and Ruby McCulley. Defendant had never been in any trouble prior to the crime charged in this case. On December 25, 1955, defendant, with Joyce and her mother, went to dinner at the home of one of Joyce's sisters. After dinner the couple drove Mrs. McCulley home, then went to visit friends, had some drinks, and returned to Joyce's apartment shortly after midnight. Since moving into the apartment, they had been bothered by squirrels and had made them the subject of a standing joke. That evening, when they were on their way up the stairs, defendant chased and teased Joyce, pretending he had caught a squirrel. She yelled, "Don't, get away." In their darkened apartment he continued to chase her; in fact they knocked over some furniture before he told her he was pretending. While defendant was in the bedroom undressing, Joyce went to the kitchen to cook something for them. While she was at the stove, defendant brought a gun from the bedroom to show Joyce how to fire it "for New Year's Eve," if he happened to be away that night. Defendant clicked the hammer several times; the last time it fired and mortally wounded Joyce.

Defendant, dressed only in his shorts, ran downstairs, knocked on the McCulleys' door, told them he had just shot Joyce, gave the gun to Mr. McCulley, and asked Joyce's parents to go upstairs to see if they could help Joyce. Defendant then went to the phone and asked the operator to call the police, and waited for their arrival.

The only other testimony at the trial which bore on the circumstances of the shooting was given by the McCulleys. They testified that sometime after midnight they were awakened by noise coming from the second-floor apartment. They heard chairs falling over onto the floor and Joyce yelling something to the effect "Don't, please don't." Both the McCulleys also testified that they heard defendant say, "I will kill you, I will kill you"; he denies making such a statement. Shortly after hearing this threat the McCulleys heard the shot, and within a few minutes they found defendant knocking at their door.

Defendant contends he was denied a fair trial (1) because the trial court should have given an instruction on manslaughter even though such an instruction was not tendered by appointed counsel; (2) because the three instructions given on malice were not warranted by the evidence and were prejudicial; (3) because testimony presented during the trial disclosing the condition of deceased was prejudicial; and (4) because the court admitted hearsay testimony concerning prior threats made by defendant to deceased.

Defendant first contends that the court erred in failing to instruct the jury on manslaughter under the evidence presented, even though no such instruction was tendered by appointed counsel. It is well settled law that the burden of submitting limiting instructions falls on the party who desires the advantage of the limitation. People v. Gratton, 28 Ill.2d 450, 192 N.E.2d 903 (1963). However, defendant's counsel on appeal claims that because he was

appointed by the court, and because such an instruction was warranted by the evidence, the trial court should have given a manslaughter instruction pursuant to Rule 25 of the Supreme Court Rules (Ill. Rev. Stat. 1963, ch. 110, § 101.25). The rule reads:

> "101.25 (Supreme Court Rule 25). Instructions in Criminal Cases. In criminal cases instructions to the jury shall be tendered, settled and given in accordance with section 67 of the Civil Practice Act, but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." (Footnote omitted.)

Although it may be that the trial court, in the interest of justice, should be more solicitous of a defendant's rights when his counsel is appointed, that problem does not arise in this case since the evidence did not warrant an instruction on manslaughter. Defendant positively denied killing deceased intentionally and claimed it was an unfortunate accident--homicide by misadventure. The State's proof, on the other hand, was that the killing was an intentional act done with malice and was therefore murder. Defendant was adequately represented by a member of the public defender's office who would presumably have offered an instruction on manslaughter if it were warranted by the evidence and if he thought it was in the best interests of defendant.

Defendant also objects to the three instructions on malice, claiming that they were not warranted by the evidence and were prejudicial. Since the record does not indicate which of the given instructions were submitted by defendant and which by the State, or that any objections were interposed at the trial, defendant cannot object on review to the instructions that were given. People v. Davis, 27 Ill.2d 33, 188 N.E.2d 43 (1963). An objection can be raised on appeal only if the defendant can come within the provisions of Supreme Court Rule 25. Defendant here has not shown, however,

that the offered instructions on malice were substantially defective or that the interests of justice required that the instructions be omitted.

Defendant's third contention is that the testimony presented during the trial disclosing the condition of deceased immediately after the shooting was prejudicial. The alleged error was in the following testimony given by the police officer who responded to the telephone message calling for the police:

> "Q Would you describe just exactly what you saw when you went to the second floor, to the kitchen?
>
> "A I saw the deceased laying in this very, very large pool of blood.
>
> "Mr. Branion [defendant's counsel]: I object to 'this very, very large pool of blood' and object to 'the deceased.' She wasn't dead then.
>
> "The Court: The matter of the deceased at that time may be a conclusion. The last of it may stand."

Defendant's objection to a description of the deceased was made only this one time.

As authority for his contention of prejudice defendant relies on People v. Nickolopoulos, 25 Ill.2d 451, 185 N.E.2d 209 (1962). However, the recital of injuries suffered in Nickolopoulos was far more extensive and detailed than that presented in the case at bar. In Nickolopoulos the amount of blood and the extent of injuries suffered were testified to in detail. The arresting officer said that there was blood on the victim's shirt, blood on the floor when he was lifted, blood on the stretcher from which he was removed when taken to the hospital. The injured man testified that as a result of the shooting he had seven holes in his intestines and a paralyzed left leg. The court found that the evidence was of such a nature as to be highly prejudicial. In the case at bar we do not find that the testimony complained of was prejudicial to defendant.

Defendant's last ground for reversal is that he was prejudiced by the introduction of damaging evidence in violation of the hearsay rule. He argues that the State introduced evidence of prior threats made to deceased by defendant through the use of hearsay evidence. The testimony complained of was that of Ruth Randall, a friend of deceased, who testified to conversations wherein deceased had told her of threats and beatings administered by defendant. The State claims that the testimony was admissible because defendant was present at the conversation to which Mrs. Randall testified and that he remained silent when Joyce made the statements to Mrs. Randall, and it contends that such silence constituted an implicit admission of guilt on his part. However, in order that silence may be deemed an admission, it must appear that the accused heard the accusation and under circumstances which afforded him an opportunity to reply, and where a person similarly situated would ordinarily have denied the imputation. People v. Bennett, 3 Ill.2d 357, 121 N.E.2d 595 (1954). The State failed to show that such circumstances existed at the time Joyce made these accusations, and thus it failed to lay the proper foundation for this testimony. Defendant objected to the admission of Mrs. Randall's testimony on the specific ground that it was not rebuttal, and also on general grounds which are sufficient to preserve the record on appeal.

We have considered the other objections raised by defendant and find them without merit. Our review of the record satisfies us that there is no such prejudicial error therein as to warrant a reversal. The admission of Mrs. Randall's testimony was error, but we do not believe it was sufficient to require a reversal and remandment for a new trial. Defendant has already served approximately eight years of his sentence. We believe the interests

of justice would be better served by reducing the punishment, as we are allowed to do under the recently adopted provision of the Code of Criminal Procedure which empowers the reviewing court on appeal to reduce the punishment imposed by the trial court (Ill. Rev. Stat. 1963, ch. 38, § 121--9, effective January 1, 1964). The judgment is amended by reducing the punishment from life imprisonment to a term of twenty years, and as amended the judgment is affirmed.

JUDGMENT AMENDED AND
AFFIRMED AS AMENDED.

BURKE, P.J., and BRYANT, J., concur.

Abstract

51 #1

(163)

IN THE
APPELLATE COURT OF ILLINOIS (51 I.A.2 163)
FOURTH DISTRICT

Gen. No. 10539 Agenda No. 1

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JEAN LEHMAN, alias GENE EDWARD LEHMAN, alias WILLIAM A. MURDOCK,
Plaintiff in Error

Writ of Error
to the
CIRCUIT COURT of
SANGAMON COUNTY.

CHOW, P. J.

The plaintiff in error appears pro se and prosecutes this writ of error to the Circuit Court of Sangamon County alleging errors in connection with the judgment rendered by that Court.

On November 13, 1959 the plaintiff in error appeared in open court in the Circuit Court of Sangamon County, waived his right to indictment by Grand Jury and consented to be proceeded against by the State's Attorney of Sangamon County by way of an information in three counts charging forgery and the making, uttering and passing of fictitious checks. Plaintiff in error was furnished a written list of the names and addresses of witnesses who might have been called by the State as to an oral statement or confession not reduced to writing. Upon arraignment the plaintiff in error entered a plea of guilty. The Court accepted the plea of guilty and sentenced the plaintiff in error to the Illinois State Penitentiary for a term of not less than six nor more than

Abstract

A

fourteen years on Count One (forgery), and not less than six nor more than twenty years on Counts Two and Three (making, uttering and passing fictitious checks), all sentences to run concurrently.

It is the theory of the defendant in error that the plaintiff in error's plea of guilty was properly received and admitted every element of the crime charged and the common law record fully supports the judgment of conviction.

Count I of the information charges Jean Lehman, alias Gene Edward Lehman, alias William A. Murdock, of forging and counterfeiting a check, payable to William A. Murdock, on February 21, 1957, at and within Sangamon County, Illinois, in the amount of $94.80, with intent to defraud Springfield Coal and Material Co., Inc., a corporation. Count II charges Lehman of making a false and fictitious check on February 21, 1957, at and within Sangamon County, Illinois, in the amount of $94.80, with intent to defraud Springfield Coal and Material Co., Inc., a corporation. Count III charges Lehman as passing, uttering and publishing a certain false and fictitious check on February 21, 1957, at and within Sangamon County, Illinois, in the amount of $94.80, with intent to defraud Springfield Coal and Material Co., Inc., a corporation.

The record shows that prior to arraignment, and after consenting to be prosecuted by way of information instead of by indictment, the defendant appeared and stated in open court that he did not want the assistance of an attorney and thereupon the court

orally explained and read to the defendant the contents of Count I, Count II, and Count III, at the same time the defendant held in his hand copies of the three Counts. He was asked by the Court:

"Q. Do you wish to have an attorney represent you?"

"A. No sir."

The defendant then stated to the Court:

> "I am wanted in the State of Indiana, I have an 8½ year parole violation, and 2 to 14 years forgery charges, which also included these same type checks, and I have a Federal detainer on me, and there will possibly be other States within a short time."

The defendant alleges as error that the court accepted the plea of guilty without advising him of the consequences of said plea. We have read the entire record and we find there is no merit in this contention. The record shows the Court stating to the defendant:

> "If you would be found guilty, you would be sentenced on Count I from one to fourteen years, and, on the other two Counts, one to twenty years, as the Court sees fit."

The defendant then said:

"I enter a plea of guilty."

The affirmative answers given by plaintiff in error throughout the abstracted record clearly indicate his understanding of the Court's remarks and advice with respect to the nature of the charges and the consequences of a plea of guilty.

The second error complained of is that the defendant was not furnished a copy of the information in accordance with CH. 38, par. 736a, ILL. REV. STATS. 1959, which states, in effect, that a person

arrested shall be furnished with a copy of the information or complaint upon which he is charged, not less than one hour previous to his arraignment. Lehman states he was not served with a copy of the information until the time of his arraignment. The record in this case does not show that the accused demanded a copy of the information filed against him. Defendant in error cites PEOPLE etc. vs. MILLER (1951) 344 Ill. App. 574, to this effect:

> "The requirement that the accused should be furnished with a copy of the information against him not less than one hour previous to his arraignment is directory only. In order to make the omission to comply with the requirement of Section 736a of Chapter 38 available on error, the accused must demand a copy of the information filed against him, and if the Court should refuse his request upon the preserving of that fact in the record it would be error, and if, as in the case at bar, the defendant would plead and go to trial without such a demand, he waives his right. PEOPLE v. POE, 304 Ill. App. 601; 26 N.E. (2) 415."

We find no merit in this contention of appellant, in view of the factual matters heretofore referred to.

The third error relied upon for reversal is that the defendant was allowed to plead guilty to charges he did not commit, and the Circuit Court did not have jurisdiction to receive and enter his plea of guilty, by the reason that no such crime had been committed in Sangamon County, Illinois. In answer to this, People assert that the plaintiff in error waived a trial by jury and the constitutional guarantees in respect to the conduct of the trial and entered a plea of guilty to the crime charged in the manner and form as charged in the information. There were no issues to try. By entering a plea of guilty he waived any defect not jurisdictional and admitted all

the facts charged in the information. (PEOPLE v. POPESCUE (1932) 345 Ill. 142, 152.) It was not incumbent upon the People to offer any proof. (PEOPLE v. NICKOLS (1945) 391 Ill. 565, 567; PEOPLE v. DEVORE (1949) 402 Ill. 339, 342.) A plea of guilty waives production of all evidence of guilt, and thereafter the defendant may not question the legal sufficiency of the evidence against him. (PEOPLE v. GREEN (1959) 17 Ill. (2) 35, 42; PEOPLE v. WILFONG (1960) 19 Ill. (2) 406, 409.)

The information in three counts clearly sets forth that Lehman forged, counterfeited, passed, uttered, published, and made a false and fictitious check in the amount of $94.80 within Sangamon County, Illinois. We find that the Circuit Court had jurisdiction and that the errors assigned by the plaintiff in error are without merit.

The judgment of the Circuit Court of Sangamon County will be affirmed.

AFFIRMED.

SPIVEY and SMITH, JJ., concur.

TERM NO. 64-5 AGENDA NO. F-5

STATE OF ILLINOIS

IN THE APPELLATE COURT

FIFTH DISTRICT

JOE C. BOYD, LA VONNE HUNT, MARY ELIZABETH MORGAN, EULALA RODDEN, JOSEPHINE KOHN, AND JOE C. BOYD, as Executor,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of
vs.	)	Christian County
JOSEPHINE BOYD,	)	
Defendant-Appellee.	)	

Smith, J.:

Plaintiffs, as executor and heirs, devisees, legatees or beneficiaries under the will of Joe E. Boyd, filed their suit against the defendant widow of said decedent to recover on an alleged oral promise of the widow to pay the estate $15,000.00. A jury found the issues in favor of the plaintiffs. The trial court granted the defendant post-trial motion and entered judgment in favor of the defendant widow. From this judgment plaintiffs appeal.

Defendant Josephine Boyd, the widow, and Joe C. Boyd, a son, were named co-executors of the will of Joe E. Boyd,

deceased. Josephine was a stepmother and had received some 200 acres of land, some personal property and a life estate in certain other real estate. The estate had considerable indebtedness and this indebtedness, together with the costs and estate taxes, was to be paid out of property other than that which the widow was to receive. There was insufficient cash and personal property to pay these items from that part of the estate as the will directed. Controversies arose between the widow and her stepchildren in the settlement of the estate and she employed her own attorney. The co-executor, the attorney for the estate, the widow and her attorney met on September 3, 1960, for the purpose of resolving the controversies. Out of that conference the present suit was generated.

The parties are in proper total agreement that a motion for judgment non obstante veredicto presents only a question of law as to whether, when all of the evidence is considered, together with all reasonable inference from it, in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiffs' case. Weiss v. Sears, Roebuck & Co., 38 Ill. App. 2d 198, 186 N. E. 2d 797; Stillfield v. Iowa-Illinois Gas & Electric Co., 25 Ill. App. 2d 478, 167 N. E. 2d 295. Neither the preponderance of the evidence nor the credibility of the witnesses are of any moment. In this context it is plaintiffs'

position that an oral contract to settle the estate, consisting of multiple parts, was made between the co-executor and the widow; that the covenants and promises were independent of each other and that the widow promised to pay the estate $15,000.00, failed to do so and it is now considerably past due. Defendants contend that the two hour conference resulted only in preliminary negotiations, that no contract was made, but if there was one, plaintiffs can't recover because they themselves did not perform their interdependent promises. The atmosphere of the conference is perhaps reflected in the fact that the co-executors and the widow were in separate rooms with the attorney for the widow operating a shuttle service.

The briefs of both appellants and appellee set out in substantially the same language the things that Josephine promised or proposed to do as follows:

1. To withdraw her claim of $44,000.00 filed against the estate.

2. To accept $3,000.00 as her widow's award although she petitioned for $5,000.00.

3. To accept $2,000.00 as her co-executor's fee.

4. To pay $15,000.00 to the estate.

5. To cancel a $13,000.00 note of Boyd-Rodden, Inc., payable to Joe E. Boyd (the decedent) or Josephine Boyd (the widow-defendant). This corporation was apparently family

owned with a Mr. Rodden as president the defendant Josephine Boyd as vice-president, and Joe E. Boyd, the co-executor as secretary-treasurer. Josephine was in possession of this note.

The testimony of Joe C. Boyd as abstracted shows the following:

"At the meeting in September Mr. Miley said they would meet certain conditions if the estate would agree to meet other conditions. Mr. Miley said these conditions were that Josephine Boyd would withdraw her claim, would accept as a widow's award $3,000.00, would accept $2,000.00 as payment for executor's commissions, and that she would turn over the $13,000.00 note, and that she would pay the estate $15,000.00. Boyd-Rodden would withdraw their claim upon receipt of the note. We discussed the estate tax. We wasn't sure how much it was going to be. The estate agreed that should it be larger than what we had anticipated at this meeting, we would not ask Josephine Boyd to come up with any more money. As it turned out, it was about $5,000.00 more than we thought at that time. If we should receive any refund, she was not to receive any of that. The claim of Boyd-Rodden, Inc., was to be withdrawn simultaneously upon receiving the note. THE $15,000.00 WAS TO BE PAID WHEN WE WERE READY TO SETTLE, CLOSE THE ESTATE, AND SHE WAS TO WITHDRAW HER CLAIM AND ALL OF THIS WAS TO HAPPEN AT ABOUT THE SAME TIME. The note to the First Trust and Savings Bank was paid immediately by check. Plaintiffs' Exhibit 2 bears my signature and the signature of Josephine Boyd, and was delivered to John Coale to pay to the bank. The federal estate taxes were paid after the meeting. After payment of the federal estate tax, a final report was prepared which I signed. Josephine Boyd did not sign it."

The First Trust and Savings Bank note of $60,000.00 was originally signed by Joe E. Boyd (the decedent) and by Josephine. The bank was pressing for payment. On the day of the conference Josephine and the co-executor signed an estate check for the balance then due on this note. It was

delivered to the bank and the note was discharged. On September 12, Josephine's attorney, by letter, forwarded to her a document withdrawing her $44,000.00 claim, requested the $13,000.00 note and her check to the estate for $15,000.00 stating "I WILL HOLD THEM ALL UNTIL THEY SHOULD BE USED IN CLOSING THE ESTATE AS PER YOUR AGREEMENT WITH JOE BOYD AND JOHN COALE." Josephine did not sign the withdrawal document, but did about October 4 forward to her attorney the $13,000.00 Boyd-Rodden, Inc., note and her check for $15,000.00 payable to the estate.

In January the federal estate tax was paid and at the trial it was stipulated that

1. Josephine's claim had not been withdrawn.
2. That the Boyd-Rodden, Inc., claim for $13,000.00 had not been withdrawn.
3. That previously $3,000.00 had been paid Josephine on the widow's award and
4. That no federal estate or state inheritance taxes were unpaid.

It further appears from the evidence that a final report was prepared and filed, that Josephine did not sign it, that she did file objections which were sustained in part and overruled in part, and that neither the $13,000.00 note nor her $15,000.00 check were ever delivered. This suit was filed October 30, 1961, seeking the collection of the $15,000.00 on the theory that it was a separate and independ-

ent promise and transaction.

Josephine testified in part as follows:

"I did not answer when Mr. Miley came in with the final proposition. I did not say anything. Mr. Miley said 'I have a proposition that Joe Boyd concocted on his own, and I have written up some things here. Will you agree?' And, Mr. Bliss, I did not answer. Mr. Miley just read the things off to me. I said nothing. I did not authorize Mr. Miley to make any kind of proposal. I don't remember signing a check to pay the bank off. Mr. Miley did outline the various phases of the settlement proposal."

We think it is abundantly clear that if this conference was but a preliminary sortie looking to a future contract, the plaintiffs' suit must fail as they then have sued on a non-existent contract. It seems to us, however, this record discloses more than conversational fencing between parties and that the fruits of the conference was a contractual formula for the closing of the Joe E. Boyd estate. Plaintiffs, of course, assert just this. Notwithstanding Josephine's testimony disclaiming any agreement her actions belie her words. She joined in signing an estate check to pay the bank - an item in controversy. She forwarded her $15,000.00 check and the $13,000.00 note to her attorney "as per your agreement with Joe Boyd and John Coale"- both items in controversy. This conduct reeks with the inference that Josephine did this because she agreed to do it - because she knew she agreed to do it. Her forwarding of this $15,000.00 check in the face of her own unsatisfied claim of $44,000.00 infers, not philanthrophy, but contract. This does not bring us to

. . .

the end of the road, however, as there are things, noted above, for both parties yet to do.

Plaintiffs contend that there was a single contract envisioning the performance by each of the parties of several separate and independent acts, i.e., that the contract was divisible and suit will lie for default in the performance of any one division. "A divisible contract is one the performance of which is divided into different groups, each set embracing performances which are the agreed exchange for each other." 12 Am. Jur. 315. In his memorandum opinion, the trial court uses this language:

> "The question whether a contract is entire or severable is primarily a question of intention, to be determined from the language used and the subject matter of the agreement. (12 I.L.P. Contracts, sec. 234, p. 412.)"... The question whether or not stipulations and covenants in a contract are dependent or independent rests on the intention of the parties at the time of contracting, as gathered from the language of the contract. In case of doubt, covenants will generally be construed as dependent rather than independent, since such a construction ordinarily prevents one party from having the benefit of the contract without performance of his own obligation. (12 I.L.P. Contracts, sec. 236, pp. 415, 416.)"

He then concluded that the covenants of the parties were mutual and dependent. This same basic thought is expressed in 12 Am. Jur. Par. 321, p. 875, as follows:

> "Generally - An agreement embracing several particulars, though made at one time and about one affair, may yet have the nature and operation

> of several different contracts when they admit of being separately executed and closed. A test of whether a transaction constitutes one contract or more than one contract is whether the parties assent to all the promises as a single whole so that there would be no bargain whatever if any promise or set of promises were struck out. In the determination of whether a particular transaction results in one entire contract or in several separate contracts, the intention of the parties is to be ascertained from the whole instrument viewed in connection with the conditions when the contract was made."

In applying these principles we must be ever mindful that this suit is to enforce a single promise of Josephine as an individual and does not directly concern her in her official capacity as co-executor. She is not made a party in her official capacity and such shortcomings of hers as executor as may appear from this record are beyond the pale of the pleadings or the issues made by them. The promises she made concerned her rights and her claims as an individual and not those inherent in her duties as co-executor. It seems clear to us that we have a single agreement composed of several parts and that the quid pro quo for the promises of each party was the closing of the Joe Boyd estate. This was their intent. This was the purpose of their meeting. This was their agreement. No one promise or act can be isolated from the other. Indeed the testimony of Joe and the letter of Josephine's attorney assert the mutuality and the interdependence of the several acts and promises. Other than the payment of the bank claim, we doubt that any promise of

either party was made as an independent promise for an independent consideration, but was made as one of several successive acts which were to culminate in the final closing of the estate. Both parties are in default. Plaintiffs have not withdrawn the Boyd-Rodden claim. The widow's award has not been finalized. The co-executors' commissions have not been fixed or determined.

Under these circumstances, the rule applicable to the limited issue before us is properly stated as follows:

> "It is a fundamental principle of the law that, in order for one to recover upon a contract, he must have performed his part of the contract. Abeles & Taussig Lumber & Tie Co. v. Northwest Side Lumber Co., 239 Ill. App. 623, at page 624, where the court said: ' It is a well-settled rule that a party suing on a contract and alleging performance can recover only by proving performance in strict accordance with the terms.'"

We necessarily conclude that the enforcement of this contract is for another forum and another day and that the piecemeal enforcement of the contract is inappropriate. Accordingly, the judgment of the trial court should be and it is hereby affirmed.

AFFIRMED.

Crow P. J. and Spivey J. Concur.

Abstract Only.

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General No. 10472 Agenda No. 3

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Alvin N. Wigington, Plaintiff-Appellant	:	
vs.	:	Appeal from the Circuit Court of Champaign County
John Faulkner, Defendant-Appellee	:	

Smith, J.

The jury returned a verdict for the defendant in a rear-end, whiplash injury type of collision. Post-trial motion was denied and plaintiff Wigington appeals from the judgment entered on the verdict. Errors relied on for reversal assert (1) that innuendoes on the part of the defense prejudiced the jury, (2) that portions of the closing argument were improper, (3) that it was error to admit and send to the jury the plaintiff's income tax return, and (4) that the verdict is against the manifest

Abstract

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51 I.A. 249

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FOURTH DISTRICT

Alvin N. Wigington,	:	
	:	
Plaintiff-Appellant	:	
	:	Appeal from the
vs.	:	Circuit Court of
	:	Champaign County
John Faulkner,	:	
Defendant-Appellee	:	

Smith, J.

The jury returned a verdict for the defendant in a rear-end, whiplash injury type of collision. Post-trial motion was denied and plaintiff Wigington appeals from the judgment entered on the verdict. Errors relied on for reversal assert (1) that immaterial on the part of the defense prejudiced the jury, (2) that portions of the closing argument were improper, (3) that it was error to admit and send to the jury the plaintiff's income tax return, and (4) that the verdict is against the manifest

weight of the evidence. Positing our review of the case in the atmosphere of the trial court, it is here noted that the case was defended on the theory that there was a fictitious claim and a malingering plaintiff.

Plaintiff first complains that the defendant throughout the trial resorted to the unpleaded tactical defense of trial by innuendo. That such a defense when iniquitous is hazardous, is not condoned and may well destroy the integrity of a verdict, has been judicially proclaimed. Miller v. Chicago Transit Authority, 3 Ill. App. 2d, 223, 121 N. E. 2d 348; Reinmueller v. Chicago Motor Coach Company, 341 Ill. App. 178, 83 N. E. 2d 120. The door to a consideration of this issue and whether the conduct in the case at bar was iniquitous or innocuous is closed for the very cogent reason that it is nowhere mentioned in the post-trial motion. "A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." Ill. Rev. Stat. 1963, Chapt. 110, Sec. 68.1, (2); Jackson v. Gordon, 37 Ill. App. 2d 41, 184 N. E. 2d 805; County Board of School Trustees v. Batchelder, 7 Ill. 2d 178, 130 N. E. 2d 175.

weight of the evidence. Yorking our review of the case in the atmosphere of the trial court, it is here noted that the case was defended on the theory that there was a fictitious claim and a malingering plaintiff.

Plaintiff first complains that the defendant wrongfully was treated to the unpleaded factual defense of trial by inference. That such a defense when injurious is hazardous, is not condoned and may well destroy the integrity of a verdict, has been judicially proclaimed. Miller v. Chicago Transit Authority, 3 Ill. App. 2d, 121, 121 N. E. 2d 369; Reimmeller v. Chicago Motor Coach Company, 341 Ill. App. 178, 93 N. E. 2d 129. The door to a consideration of this issue and whether the conduct in the case at bar was injurious or innocuous is closed for the very cogent reason that it is nowhere mentioned in the post-trial motion. "A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." Ill. Rev. Stat. 1953, Chapt. 110, Sec. 68.1, (2); Jackson v. Gordon, 37 Ill. App. 2d 41, 184 N. E. 2d 805; County Board of School Trustees v. Batchelder, 7 Ill. 2d 178, 130 N. E. 2d 175.

Defendant further complains of the failure of the trial court to grant a mistrial because of a statement of defense counsel in closing argument. The final arguments were not reported and the only indication of what was said is counsel's statement to the trial court in chambers after objection that defense counsel stated "that his client came back to Illinois and that he never knew about this claim until one year later". The suggestion that this was a plea of the defendant for sympathy or might be construed as a hint that no insurance existed appears to us to be non sequiturs. In the absence of the arguments in the record, there is nothing whereby we may determine the prejudicial effect of this remark, if any. McCormick v. Kopmann, 23 Ill. App. 2d. 189, 161 N.E. 2d 720; Department of Public Works and Buildings v. Bloomer, 28 Ill. 2d 267, 191 N. E. 2d 245.

This accident occurred August 15, 1960. Plaintiff's income tax returns for 1956, 1957, 1958, 1959, 1960, and 1961, were made available to defendant in response to interrogatories and marked as defendant's exhibits. The returns for 1956, 1957, and 1958, were excluded on objection that they were too remote, referred to business

other than one in which plaintiff was then engaged, and were not properly related to loss of earnings. During the cross-examination of plaintiff, the abstract shows the following:

"Q. Isn't it true that your cost of doing business, or your cost of operation was about the same for 1961 as it was for 1960?

"A. I wouldn't say that, no.

"Q. Isn't it true...I just want to show you your figures that you used on these returns here, that you supplied to me, Mr. Wigington, and I noticed here that for 1960 you have less travel expenses not paid by the company $5,205.00 during 1960?

"Mr. Zimmerly: Excuse me. That is not a fair statement.

"Mr. Follmer: Isn't that correct?

"Mr. Zimmerly: No. That includes depreciation, and several other items.

"A. That doesn't say anything about the breakdown that you asked, Mr. Follmer.

"Q. Yes. But I'm talking about the difference now between your gross revenue, your gross commissions, and then the amount that you charged or that you have determined to be your cost of doing business, or your travel expense.

"A. The Five Thousand some odd dollars doesn't purport to be all of the increased expenses, or expenses of doing business, the way you are telling about that.

"Q. Mr. Wigington, the question that I am asking, though, is that your overall travel expenses in your computation was about the same for 1960 as 1961, isn't that correct?

"Mr. Zimmerly: Mr. Follmer, that is not true. It shows $5,200.00 in 1960 and $4,700.00, $500.00 less—.

"The Court: Let's find out from the witness, rather than counsel telling the jury.

"Mr. Follmer: Mark these two exhibits...for identification Defendant's Exhibits 105 and 106."

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"Q. Isn't it true that your cost of doing business, or your cost of operation was about the same for 1961 as it was for 1960?

"A. I wouldn't say that, no.

"Q. Isn't it true...I just want to show you your figured that you used on those returns here, that you supplied to me, Mr. Wigington, and I noticed here that for 1960 you have legal counsel expenses not paid by the company $5,205.00 during 1960?

"Mr. Kimmerly: Excuse me. That is not a fair statement.

"Mr. Pollmer: Isn't that correct?

"Mr. Kimmerly: No. That includes depreciation, and several other items.

"A. Then doesn't say anything about the breakdown that you asked, Mr. Pollmer.

"Q. Yes. But I'm talking about the difference now between your gross returns, your gross commissions, and then the amount that you charged or that you have determined to be your cost of doing business, or your travel expense.

"A. The fifty thousand some odd dollars doesn't purport to be all of the increased expenses, or expenses of doing business, the way you are telling about that.

"Q. Mr. Wigington, the question that I am asking, though, is that your overall travel experience in your operation was about the same for 1960 as 1961, isn't that correct?

"Mr. Kimmerly: Mr. Pollmer, that is not true. It shows $5,106.80 in 1960 and $4,760.00, $100.00 less—.

"The Court: Let's find out from the witness, rather than counsel calling the jury.

"Mr. Pollmer: Mark these two exhibits...for identification Defendant's Exhibit 103 and 104.

"Defendant's Exhibit 105 is a W-2 statement and is also the first page of form 1040 I filed in 1961. It shows the computation of gross earnings and net deductions. It shows my gross earnings as $8,800.00. It shows travel expenses deduction of $4,709.28.

"Defendant's Exhibit 106, for 1960, shows a gross income of $8,625.00 and a travel expense of $5,205.97. I had other expenses deducted on this report. An accountant prepared it.

"Mr. Zimmerly: Mr. Follmer, we will stipulate, in order to put an end to all of this, that these returns shown by the accountant are accurate. All that he (the witness) is saying is in another column later on there is an item of $1,000.00 which is immaterial. The $5,205.00 is the travel expense in 1960, and the $4,700.00 in 1961.

"The Court: Those are travel expense items?

"Mr. Zimmerly: Yes, including depreciation of the car.

"Q. Then the two figures are very similar for 1961 and 1960?

"Mr. Zimmerly: Object.

"The Court: Well, they show for themselves whether they are similar or not similar.

"Mr. Zimmerly: That's right. $500.00 difference."

Later in chambers the abstract shows the following:

"The Court: The photographs, Defendant's Exhibits 101 through 104 will be admitted into evidence. Number 105 and 106—

"Mr. Zimmerly: Are the income tax returns to which we object.

"The Court: What is the objection?

"(Mr. Zimmerly presented oral argument in support of his objection to Defendant's Exhibits Numbers 105 and 106.)

"The Court: I will admit 105 and 106."

An affidavit of plaintiff's attorney and that of an Assistant State's Attorney states that they checked the jury room immediately after it was vacated and pieced together

six small bits of paper on which was written "Exhibit A 1961 - Tax - Explain carryover loss - 1958 - Explain deduction of $1,261.40 1961 - Return." It is thus contended that it was prejudicial error to send these returns to the jury and that extraneous matters were thus injected into their deliberations. It is now suggested that the returns showed such things as charitable contributions, business losses from prior years, trade-ins of automobiles, depreciation and other factors not relevant to a personal injury case. The record is silent as to the theory on which the returns were offered and admitted and equally silent as to the specific objections made before the trial court. In Kleran v. Bowman, 15 Ill. App. 2d 148, 159, 145 N. E. 2d 810, the court stated:

> "Perhaps it would have been better had only certain portions of the documents been admitted into evidence, but no objection was interposed in this respect."

It is apparent that the objections now made might readily have been appropriately obviated in the trial court by stipulation or limitation of the use of the exhibit. The rule appears to be as follows:

> "Where an objection to the admission of evidence is of such character that, if pointed out at the time, it can be obviated, it is the duty of the party objecting to specify the grounds of the objection, and if he does not do so he cannot raise the objection for the first time in a court of review." 2 I. L. P. 297 Appeal and Error, Sec. 258.

The loss of earnings was an element of damage claimed by the plaintiff. It was an issue in the case. Plaintiff's testimony was somewhat confusing on this point. It was stipulated that the figures shown on the return were accurate. They were figures prepared by the plaintiff's agent and adopted by him as true. In the state of the record before us, we cannot say that the events surrounding the use of the income tax returns sufficiently contaminated or affected the verdict to warrant a new trial or indeed that they affected the general verdict at all.

We now turn to the charge that the verdict is against the manifest weight of the evidence. The issue of plaintiff's contributory negligence was withdrawn from the consideration of the jury by the court and we think properly so.

The accident happened on August 15, 1960, on a six-lane arterial thoroughfare in the business district of Dallas, Texas. Three lanes handled southbound traffic

and three lanes handled northbound traffic. It was a clear, bright day; the pavement was dry; the roadway was level, straight and of asphalt construction; no skid marks were visible and no eye witnesses other than the parties, were available. Plaintiff, a resident of Wichita Falls, Texas, was alone in his car driving south in the inner southbound lane approaching traffic control lights and intending to make a lefthand turn. He testified that he was fully stopped for the lights at the time of the accident and that his foot was on the brake pedal. Defendant, a resident of Champaign, Illinois, was also alone proceeding southward in the same lane and attempting to move to the right into the second southbound lane. Defendant's left front bumper struck the plaintiff's right rear corner damaging the right rear stop light, the wrap-around bumper and the right-rear quarter panel.

Defendant testified:

"I was in the lefthand lane as I was going south, next to the center of the street. I don't know when I noticed the traffic lights. I don't know that I ever did see them before the collision.

"I did slacken in speed before hitting the rear of Mr. Wigington's car; I don't know how much. I was driving slowly through the area, because I was very unfamiliar with it.

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Defendant testified:

"I was in the left-hand lane as I was going south, next to the center of the street. I don't know when I noticed the traffic lights. I don't know that I ever did see them before the collision.

"I did slacken in speed before hitting the rear of Mr. Wigington's car; I don't know how much. I was driving slowly through the area, because I was very unfamiliar with it.

"I didn't look at the speedometer and note exactly how fast I was driving. I would guess I was driving about 25. I don't know how fast I was going when I actually struck Mr. Wigington's car. I was just moving at the time I hit it. I had slowed down to make a turn to the right to go around Mr. Wigington. To slow down I had to put on my brakes.

"At the time of impact I was looking to my right and to the rear. I had my head turned and I was looking behind me.

"I would assume I was about a car length from the Wigington car when I last saw it. At that time I do not recall seeing its brake lights on. As I reflect, I assume the car was moving when I last saw it. At the time of taking my deposition I said I believed it was moving when I last saw it.

"I do not know how fast it was going. I was in a stream of traffic and was just moving with the traffic.

"I do not know how many cars were ahead of Mr. Wigington or how many were behind me. When I looked behind me I did not see anything to contend with in making my right turn. I don't know how far in back of me the nearest car was.

"The railroad tracks had nothing to do with the collision.

"I did not see the stop line before the collision. I do not recall seeing left turn blinkers on Mr. Wigington's car before the collision. He was in the left turn lane.

"I intended to get over into the righthand lane and go straight ahead. I was not conscious of any other traffic that concerned me. I was not distracted by other traffic. There were no other cars stopped at or near the stop light that I recall at this time....We both got out of our cars and I said to Mr. Wigington that I didn't know how this could have happened. I think I made some reference to did he stop in front of me as I was making a turn. I do not recall his answer, he could have said that he had been stopped there for awhile, or words to that effect. I saw no blood or any sign of trauma at that time. I am sure that I said I thought he was moving.

"I didn't look at the speedometer and note exactly how fast I was driving. I would guess I was driving about 25. I don't know how fast I was going when I accidentally struck Mr. Wigington's car. I was just moving at the time I hit it. I had slowed down to make a turn as the light to go around Mr. Wigington. To slow down I had to put on my brakes.

"At the time of impact I was looking to my right and to the rear. I had my head turned and I was looking behind me.

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"I did think he was moving. I can only judge how fast I think he was moving by how fast I was going. We were moving in the stream of traffic. I do not know when was the last time I looked at that intersection to see if there would be a necessity for the car ahead of me to stop."

Plaintiff testified that he noticed the intersection lights turn from amber to red and he stopped at the red light and sat there about 20 seconds, that his foot was on the brake and it was being actuated; that his turn signal was on and had been turned on some time. He stated that the defendant said, "I'm sorry, I didn't see you." "At the scene I didn't see anything unusual about my body and did not feel injured." He continued his sales calls and about 3 p.m. noted that he had no feeling in his left hand. He quit working, had a terrific headache, and drove to his home arriving about 9:30 p.m. On the 16th, he hurt all over, on the 17th, he took his car to the garage with his wife driving, on the 18th, he saw his doctor who refused to examine him and recommended an orthopedic physician. He contacted Dr. Jackson on August 29 - his physical complaints thereafter required a neck brace, pills, cervical pillow and injections. He discontinued golf, bowling, and playing the bass drum.

The medical testimony of Dr. Jackson and of defendant's doctor is quite extensive. Their conclusions on the

X-rays were in direct contrast. It is epitomized by the following statement of Dr. Mussey as follows:

"On the first films it did not have the appearance of a recent compression. That is my opinion contrasted to hers. It may have been something he was born with. It might have been something that resulted from trauma on August 15, 1960. I felt it was less likely. She felt it was more likely. It is a matter on which professional people might disagree. She had the responsibility of trying to get the man well."

He further testified:

"It was my feeling that the differences in grip testing were far greater than they would be in the ordinary person who is examined, and the explanation would be either malingering or hysteria. I found no organic cause for it."

Dr. Jackson found permanent injury and clinical changes in the X-rays. She then testified:

"Based on a reasonable medical certainty, Mr. Wigington will continue to have symptons, pain and muscle spasm, numbness and tingling of his fingers for the rest of his life. This will vary from time to time.

"My objective findings are of persistent muscle spasm, changes in the reflex in the arms, the dilated pupil, difference in the blood pressure in the two arms.

"I have had no cause to believe that Mr. Wigington was malingering or faking in any manner. I have never found any manifestation of hysteria in Mr. Wigington.

"If I had no history, and I saw those X-rays, and with my clinical examination, I would have to make the same diagnosis. I could not tell the exact time at which the injury occurred, but I would know there had been an injury...."

With the issue of plaintiff's exercise of due care removed from jury consideration by the trial court, there yet remained the issue of the defendant's negligence, the question of causation and the nature and the extent of plaintiff's injuries. In the face of a general verdict, our province is sharply delineated.

A court of review in passing on the question of whether the verdict is against the manifest weight of the evidence must take into consideration not only the verdict of the jury but the fact that the trial judge also saw and heard the witnesses, heard arguments of counsel, and then denied the motion for new trial. Mokrzycki v. Olson Rug Co., 28 Ill. App. 2d 117, 170 N. E. 2d 635. In order for the court to determine that the verdict is against the manifest weight of the evidence an opposite conclusion must be clearly evident or the jury's verdict palpably erroneous and wholly unwarranted. Benkowsky v. Chicago Transit Authority, 28 Ill. App. 2d 257, 171 N. E. 2d 416. A verdict will not be set aside merely because the jury could have found differently or because judges feel that other conclusions would be more reasonable. Kahn v. James Burton Co., 5 Ill. 2d 614, 126 N. E. 2d 836. Vasic v. Chicago Transit Authority, 33 Ill. App. 2d 103, 178 N. E. 2d 670.

On the issue of negligence the testimony of each party's conduct rests solely with him. Plaintiff states his signal lights were on, the brakes were actuated and he was at a full stop for at least 20 seconds. Defendant, on the other hand, thought the plaintiff was moving, did not recall seeing any brake lights or directional lights. He stated that his head was turned and he was looking over his right shoulder at the time of the impact. If defendant was traveling at the rate of 10 m.p.h. he traveled about 293 feet while the plaintiff was stationary with his directional lights on and his brakes actuated - strange that the defendant did not see them. Equally strange that defendant traveled 293 feet looking over his right shoulder! Neither can we say that defendant's conduct in his change of lane maneuver is so unusual or unorthodox that a jury verdict finding it non-negligent is palpably erroneous or wholly unwarranted. Reasonable men might well reach different conclusions as they appraise the testimony and the conduct of each of the parties. Their demeanor, manner of testifying, and conduct on the witness stand - not revealed by the written record - may well have affected their credibility. We thus find ourselves in that area where the

on the issue of negligence the testimony of each party's counsel varies sharply with his. Plaintiff states his signal lights were on, his brakes were actuated and he was at a full stop for at least 20 seconds. Defendant, on the other hand, thought the plaintiff was moving, did not recall seeing any brake lights or directional lights. He stated that his hood was tucked and he was looking over his right shoulder at the time of the impact. If defendant was traveling at the rate of 10 m.p.h. he traveled about 293 feet while the plaintiff was stationary with his directional lights on and his brakes actuated - strange that the defendant did not see them. Equally strange that defendant traveled 293 feet looking over his right shoulder! Matthew can we say that defendant's conduct in his choice of lane maneuver is so unusual or unorthodox that a jury verdict finding it non-negligent is palpably erroneous or wholly unwarranted. Reasonable men might well reach different conclusions as they appraise the testimony and the conduct of each of the parties. Their demeanor, manner of testifying, and conduct on the witness stand - not revealed by the written record - may well have affected their credibility. We thus find ourselves in that area where the

jury is the proper tribunal to decide the evidentiary issue presented by this record. Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N. E. 2d 74.

We have carefully read the medical and other testimony on the question of causation, the extent of plaintiff's injuries and whether they were real or imaginary. The correct answer to and the conclusions to be drawn from the testimony on these issues revolve around the question of credibility of the witnesses and is, thus, within the province of the jury.

We thus conclude that no error intervened in this cause which contaminated the verdict nor can we say that the jury's verdict is against the manifest weight of the evidence or that an opposite conclusion is clearly indicated. Under such circumstances, the verdict of the jury and the judgment entered thereon cannot be disturbed. The judgment is accordingly affirmed.

Affirmed.

CROW, P.J. and SPIVEY, J. concur

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We thus conclude that no error occurred in this cause which contaminated the verdict nor can we say that the jury's verdict is against the manifest weight of the evidence or that an opposite conclusion is clearly indicated. Under such circumstances, the verdict of the jury and the judgment entered thereon cannot be disturbed.

The judgment is accordingly affirmed.

Affirmed.

CROW, P.J. and SPIVEY, J. concur

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SPRINGFIELD 62701

ROBERT L. CONN, CLERK
TELEPHONE
AREA CODE 217
525-2586

Abst. of Opinion

September 15, 1964

Callaghan & Company
6141 North Cicero Avenue
Chicago 46, Illinois

Attention: Editorial Department

Gentlemen:

Judge Smith has ordered the following corrections to be made in the Court's opinion filed on September 8, 1964 in the case of Wigington vs. Faulkner, General No. 10472.

Page 3: The first word in the top line should read "Plaintiff" instead of "Defendant".

Page 11: The last word on the fourth line of the first quote of Dr. Mussey should read "trauma" instead of "truma".

Very truly yours,

Robert L. Conn

Clerk, Appellate Court
Fourth District

RLC:ih

To amend Sept 16.. correction to be made on [illegible]

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

Gen. No. 10535

THEDA SMITH,
Plaintiff-Appellee,

vs.

THOMAS W. BISHOP, JR.,
Defendant-Appellant.

Appeal from the
Circuit Court of
Champaign County.

CROW, P. J.

A jury in the Circuit Court of Champaign County awarded the plaintiff, Theda Smith, damages of $415.00 for the funeral expenses of her children and $50,000.00 for her own personal injuries against Thomas W. Bishop, Jr., defendant. She was injured while riding as an occupant of an automobile owned and driven by her husband. Judgments for the plaintiff were entered on the verdicts. The defendant's post trial motion was denied. No questions are raised on the pleadings. The defendant's motions for directed verdict were denied. The plaintiff's motion at the close of all the evidence for a directed verdict as to the issue of contributory negligence was allowed.

The evidence discloses that the plaintiff's husband, with the plaintiff in the right front seat, was driving his car southeast upon U. S. Route 150 at approximately 2½ miles southeast of

Abstract

(340)

(27 I.R.2.340)

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

Gen. No. 16235

THEDA SMITH,
Plaintiff-Appellee,

vs.

THOMAS W. BISHOP, JR.,
Defendant-Appellant.

Appeal from the
Circuit Court of
Champaign County.

CROW, P. J.

A jury in the Circuit Court of Champaign County awarded the plaintiff, Theda Smith, damages of $425.00 for the funeral expenses of her children and $30,000.00 for her own personal injuries against Thomas W. Bishop, Jr., defendant. She was injured while riding as an occupant of an automobile owned and driven by her husband. Judgments for the plaintiff were entered on the verdicts. The defendant's post trial motion was denied. He questions are raised on the pleadings. The defendant's motions for directed verdict were denied. The plaintiff's motion at the close of all the evidence for a directed verdict as to the issue of contributory negligence was allowed.

The evidence discloses that the plaintiff's husband, with the plaintiff in the right front seat, was driving his car south-east upon U. S. Route 150 at approximately 2½ miles southeast of

Downs, Illinois, on August 23, 1958. The car collided with the rear of a milk truck driven by the defendant, as the defendant was making a left turn into a farm drive. She, her husband, and their three children, had been to Bloomington to a doctor concerning a foot condition of one of the children for which the child was being treated. The appointment was for around 10:00 a.m., and about 11:00 a.m., following the appointment, the car driven by the plaintiff's husband collided with the truck. One of their children was in the middle of the front seat, their baby was on the plaintiff's lap, and their boy was in the back seat. The roadway was curved at or near the point of the collision. The plaintiff testified that the speed of her husband's car some 600 feet from the point of the collision was 55 or 60 miles per hour, and she first saw a milk truck, as they rounded the curve, about 200 feet in front of them, (or when they were 600 feet back from the truck), traveling in the same direction as they were, and proceeding at about 45 miles per hour and going slower. Their car eased over to the passing lane, the truck eased over a little to the right, maybe about two feet, she said, and when they were about 75 feet back of the milk truck, it turned left in front of their car and then she screamed and said "look out", and in a second of time the collision occurred and she could not remember anything further. That was the only thing she said to her husband about the truck. When she screamed her husband pulled to the right. She does remember that there was a repair zone on the highway at or near the curve, that she noticed signs prior to

on the highway at or near the curve, when she noticed plaintiff in
pulled to the right. She does remember that there was a repair van
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was making a left turn into a farm drive. She, her husband, and
Dover, Illinois, on August 23, 1956. The car collided with the

coming into the curve --- "DRIVE SLOWLY - REPAIR ZONE", that about a 2 foot strip of concrete had recently been placed on the left or north side of the road, and the dirt had been removed from the edge of the pavement on the right or south side, some 6 or 8 inches, - there was a "drop-off" on the right edge; as they came up to the truck she saw no hand turn signal given by the truck driver. She was asked this question: "Did you see any directional lights of any kind on his (milk truck) unit?", and she answered: "He might have had directional lights, but I didn't see them." She described the left turn as a gradual turn. She remembers there was some lettering on the milk truck bed. The truck bed was light in color.

Thomas W. Bishop, Jr., the defendant, testified that he was employed in hauling milk for the Farmer City Cheese Company; the milk truck he was driving had a red cab with a sort of white and cream colored bed; it was approximately 8 feet wide and close to 8 feet high and about 22 or 23 feet long, and there was painted on the back "CAUTION - THIS TRUCK STOPS AT FARMS". He further stated that before he started out on the route that morning he checked the lights and the brakes, cleaned the side view mirrors, the windshield, and the side glasses, and actually looked at and tested the directional lights. The directional lights, both right and left, were in working order, he said. He was engaged in picking up milk at various farms in the neighborhood, and just before he went to the Kagel farm he had approximately 4000 pounds of milk in the truck. About 11:00 a.m. he was proceeding in a southeasterly direction on

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2 foot strip of concrete had recently been placed on the left or

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green colored bed; it was approximately 8 feet wide and close to 8

feet high and about 22 or 23 feet long, and there was painted on the

U. S. 150, just east of Downs, toward the Kagel farm, and as he rounded the curve he was traveling in the neighborhood of 45 miles per hour, and as he approached closer to the farm drive he reduced his speed. He turned on the left turn signal just as he rounded the curve, about 600 feet from the farm driveway. The curve began about 600 feet from the Kagel driveway, and he left the turn signal on until he got to the driveway and it was on until the moment of impact, he said. They were working on widening the road on the south side, and it was dug out. He said with a truck that wide you have to use all of one lane. He held the right side until he got to where he thought he could make a left turn and he then made a turn into the farm lane. There were no oncoming cars from the opposite direction. It was almost a right angle left turn. He was going 5-10 mph at the time. Before he made the turn he looked into his rear view mirror for traffic and he saw a car coming from behind just rounding the curve. He had no opinion as to its speed. He did not know there was a car close enough to pass him. He then proceeded to make his turn and that is the last thing he knew until the car hit him. He did not hear any sound of a horn or any squeal of brakes or tires. The cab was off the road at the time of impact and the rear wheels were about at the edge of the road, he said. The truck bed broke loose upon the impact and the truck stopped with the back about two feet north of the center of the road. Bishop had no vision in his right eye except for light perception.

On cross examination, the defendant testified that the rear directional signal lights on his truck were on the chassis, under

directional signal lights on his truck were on the chassis, under

the truck bed, about three feet from the rear of the truck bed, and in a couple of feet from the edge of the equipment. The lights were fastened on to the end of the frame of the truck. The directional lights would have been below the level of the top of the dual wheels, on the back part of the chassis frame. He did not give any signal by hand. He was then asked the following questions and gave these answers;

"Q. And just as you turned in there you looked back and you saw a car just coming out of the curve eight hundred feet back?

A. Right.

Q. And did you continue to proceed in to the driveway, or did you stop?

A. I proceeded.

Q. And you then had a distance of eleven feet for your front wheels to travel to get off the north side of the pavement, correct?

A. Right.

Q. And do you mean to tell the Court and jury that this car that was coming from the curve traveled eight hundred feet while you were traveling eleven feet?

A. It surely did."

It was stipulated the truck driven by the defendant was 22 feet long, 7' 8" wide, 8' high, the milk bed detached by the impact was 13' long and extended 3' back from the frame, Route 150 was being widened, the north lane was 11' wide, the south lane was 9' wide, the black topping had not yet been applied, and there was a ditch on the south side extending out from the edge of the pavement about 3 feet.

Margie Kagel, a witness for the defendant, testified that she lived between Downs and Leroy, on Route U. S. 150, that her husband's occupation was farming, and her home was on the north side of the road. About 11:00 o'clock that morning she was ironing and waiting for her husband to come home. About that time she had occasion to go to the window and look down the road. She saw the truck driven by the defendant Bishop and she expected him to come to the house to pick up milk. When she first saw the truck it was coming around the curve, and she observed it as it came down the road toward the house. She did not see the plaintiff's car approaching. She was asked these questions and gave these answers:

"Q. And what if anything did you observe about the left turn signals on the truck as it approached?

A. Well, it was flashing.

Q. Where was the signal that you saw that was flashing? Where was it located on the truck?

A. It was on the left front fender, I think."

She further testified that she went back to her ironing and she did not hear anything but a loud crash, and immediately before the crash she did not hear any sounds of tire squealing, or brakes being applied, or a horn.

Chester Henry, a State Trooper, said when he arrived the rear of the truck was about at the center of the road, the milk bed tumbled over to the east side of the farm driveway, lying parallel to the chassis, the damage to the car the plaintiff was in was to the left front corner, the curve in the road was 550 feet from the farm drive-

corner, the curve in the road was 200 feet from the farm drive-
chester, the change to the car the plaintiff was in was to the left
of the truck was about at the center of the road, the rain had swelled
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"Chester Henry, a State Trooper, said when he arrived the rear

Q. Did you see the defendant's car before the accident?

A. Yes, I did.

Q. Where was it?

A. It was on the left front fender, I think."

The witness for the defendant, Beulah Mae Lived between Dorin and Lacey, on Route 9, R. 170, that her husband's carpenter, Ken Farley, and her home was on the north side of the road. Mrs. Kitson stated that morning she was standing waiting for her husband to come home. About that time she had occasion to go to the window and look down the road. She saw the truck driven by the defendant Bishop and she observed him to come to the house to pick up nails. When she first saw the truck coming around the curve, and she observed it as it came down the road toward the house. She did not see the plaintiff's car approach. She was asked these questions and gave these answers:

"Q. And what if anything did you observe about the left turn signals on the truck as it approached?

A. Well, it was flashing.

Q. Where was the signal that you saw that was flashing? Where was it located on the truck?

A. It was on the left front fender, I think."

way, the line of sight (unobstructed) around the curve to the farm driveway was about 880 feet, and he found no skid marks. The truck was facing in a northwesterly direction toward the Kagle driveway. There was a mark of fresh damage at the left rear corner of the truck.

At the close of all the evidence the court allowed the plaintiff's motion for directed verdict as to contributory negligence and gave the following instruction on the motion of the plaintiff:

> "The court instructs the jury that it has been determined as a matter of law in this case that the plaintiff, Theda Smith, was in the exercise of ordinary care for her own safety at and immediately prior to the occurrence of the collision in question; and, if you find that the defendant, Thomas W. Bishop, Jr., was negligent as defined in these instructions, and that the plaintiff was injured as a result of such negligence, then you may find the issues for the plaintiff and assess the plaintiff's damages."

At the conference on instructions, the Court refused the defendant's offered instruction No. 8, which was as follows:

> "It was the duty of the plaintiff, before and at the time of the occurrence, to use ordinary care for her own safety."

Similarly, the Court refused the defendant's offered instruction No. 10, which was:

> "When I use the expression 'contributory negligence', I mean negligence on the part of the plaintiff that proximately contributed to cause the alleged injury."

The defendant-appellant's theory is that the trial Court should not have directed a verdict for the plaintiff as to the issue of contributory negligence; the issue of contributory negligence should have been submitted to the jury under the instructions tendered by the defendant and refused; the verdict of the jury as to the issue of the defendant's negligence was against the manifest weight of the evidence; and the trial court should have given the defendant's

offered instructions 8, 10, and 14, and should have refused the plaintiff's given instructions 9 and 10.

The plaintiff-appellee's theory is (1) the verdict finding the defendant liable is not against the weight of the evidence; (2) where the plaintiff had no legal nor physical control over the automobile in which she was riding, she was, as a matter of law, not guilty of contributory negligence where it is undisputed that she kept a reasonable lookout and cried out the moment the truck swung left - and it was proper to direct a verdict for the plaintiff upon that issue; and (3) "joint enterprise" applies only to business relationships, and does not apply where one spouse accompanies the other for the mutual benefit of the family. As to the instructions, the plaintiff says the defendant does not argue any point in his brief here on plaintiff's instructions 9 and 10 and hence his point is waived as to that, and the defendant's offered instructions 8, 10, and 14 pertain to contributory negligence and if the Court was correct in directing a verdict on that issue those instructions were not proper.

The defendant's principal contention on this appeal is that the trial court should have permitted the jury to pass upon the question of contributory negligence, vel non, of the plaintiff. We think there is merit in this contention. It is the province of the jury, primarily, to determine the weight of the evidence and the credibility of the witnesses; generally contributory negligence, vel non, is a question of fact for the jury, and as long as a question remains whether either party has performed his legal duty or observed that

degree of care imposed upon him by law, and the determination involves the weighing and consideration of evidence, the question must be submitted as one of fact; ordinarily the question of contributory negligence is preeminently a question of fact for consideration of a jury, upon which both parties are entitled to have the finding of a jury; even if the facts are admitted or undisputed, but there is a difference of opinion as to the inference that may legitimately be drawn from them, the question of contributory negligence ought to be submitted to the jury, - it is primarily for the jury to draw the inference: Cf. CLOUDMAN et al. v. BEFFA et al. (1955) 7 Ill. App. (2) 276. If there is any evidence, however slight, of contributory negligence on the part of the plaintiff, a question of fact is presented and it must be presented to the jury for determination; the plaintiff must sustain the burden of proving due care and caution on his or her part: LOWE v. GRAY etc. (1963) 39 Ill. App. (2) 345.

In the light of the testimony, in certain respects conflicting, of the plaintiff, and the defendant, corroborated in part by Marie Kagel, it is readily apparent that there was a duty on the part of the plaintiff, as a passenger in the automobile, where she had an opportunity to learn of danger and avoid it, to warn the driver of such approaching danger, and she had no right, because someone else was driving, to omit any reasonable and prudent efforts on her part to avoid danger: WALKER et al. v. ILLINOIS COMMERCIAL TELEPHONE CO. et al. (1942) 315 Ill. App. 553; Cf. PIENTA v. CHICAGO CITY RY. CO. (1918) 284 Ill. 246. The defendant Bishop testified particularly

that the left turn signals were on on the milk truck and were operating when his truck started around the curve some 600 feet before the turn to the Kagel farm home. The plaintiff testified with respect to the signals that "He might have had directional lights, but I did not see them." We cannot say, as a matter of law, from all the evidence that the plaintiff was not guilty of contributory negligence, as the plaintiff admitted she did nothing and said nothing to her husband except the words "look out" when the defendant's truck was some 75 feet in front of her husband's car. She was required to use reasonable precautions for her own safety, and whether she did use such, in the light of the evidence of facts that might have apprised her of danger was a question for the jury: PIPER et al. v. LAMB et al. (1960) 27 Ill. App. (2) 99. Representative of the cases the plaintiff cites are: TURNER v. SEYFERT (1963) 44 Ill. App. (2) 281, MARTIN v. MILES (1963) 41 Ill. App. (2) 208, IVY v. CHICAGO TRANSIT AUTHORITY et al. (1959) 23 Ill. App. (2) 251, KAMHOLTZ v. STEPP (1961) 31 Ill. App. (2) 357, and SMITH v. POLUKEY et al. (1959) 22 Ill. App. (2) 238. We do not think they are applicable to the facts and point involved here. We believe the trial Court erred in directing a verdict for the plaintiff on the issue of contributory negligence, and in giving the plaintiff's instruction to that effect, and in refusing the defendant's offered instructions Nos. 8 and 10. The question should have been submitted to the jury as a question of fact.

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It is not necessary to consider other points presented.

The judgments will be reversed and the cause remanded for a new trial.

REVERSED and REMANDED.

SPIVEY and SMITH, JJ., concur

It is not necessary to consider other points presented.

The judgments will be reversed and the cause remanded for a new trial.

REVERSED and REMANDED.

RILEY and BAILEY, JJ., concur.

Gen. No. 64-55 (51 I.A.2d 411) Agenda No. 38

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	:	WRIT OF ERROR TO
Defendant in Error,	:	THE CIRCUIT COURT
-vs-	:	OF BOND COUNTY.
CARL H. STOWE,	:	
Plaintiff in Error.	:	

DOVE, P. J.

On January 9, 1962, the grand jury of Bond County returned a three-count indictment. One count charged Carl A. Stowe with embezzlement of money by virtue of a check, on November 9, 1960, of the value of $6877.36, being the property of Darrell Timmons. Count two charged the defendant with the embezzlement, on November 9, 1960, of a check of the value of $1146.22, being the property of Darrell Timmons. Count three charged the defendant with the embezzlement of money of the value

of $6877.36, being the property of Darrell Timmons, Lucien H. Comer and seven other named persons, describing them as heirs of the Irene Comer Estate. To this indictment the defendant entered a plea of not guilty and the issues thus made were submitted to a jury, resulting in a verdict finding defendant guilty. Thereafter, on motion of the defendant, this verdict was set aside, and a new trial awarded defendant. On the same day this order was entered, the trial court, upon motion of the state's attorney, entered a nolle prosequi.

Thereafter, on May 29, 1962, the ten-count indictment upon which this prosecution is founded was returned by the grand jury of Bond County, to five counts of which an order of nolle prosequi was subsequently entered on motion of the state's attorney. One of the remaining counts as abstracted by counsel for defendant, "charged defendant as an agent of one Darrell Timmons with embezzlement of property of the value of $8950.00, from one Darrell Timmons, on November 9, 1960." Another count "charged defendant as agent of one Darrell Timmons with embezzlement of property of the value of $7572.13 of Darrell Timmons." Another count charged defendant, "as agent of Darrell Timmons with embezzlement on November 9, 1960, of a check being the property of Darrell Timmons." The other counts charged defendant "as agent and solicitor in the employ of Darrell Timmons with em-

bezzlement of a check of the value of $8950.00, being the property of said Darrell Timmons." The defendant entered a plea of not guilty and a jury trial resulted in a verdict finding the defendant guilty of embezzlement, and fixing the value of the embezzled property at $7155.00. After denying defendant's post-trial motion, judgment was entered upon the verdict and defendant was committed to the Illinois State Penitentiary for an indeterminate sentence of not less then two years and not more than five years. To reverse this judgment the record is before this court for review.

It is insisted by counsel for defendant that there is, (1) a variance between the allegations of the indictment and the evidence produced on the trial, (2) that certain exhibits were improperly admitted in evidence, (3) that the court erred in giving one instruction tendered by the state's attorney and also erred in refusing one instruction tendered by defendant, and (4) that the court erred in not sustaining defendant's plea in abatement, which sought the discharge of the defendant on the ground that the charges defendant was required to defend against in the first trial were the same charges he was obliged to defend himself against in the second trial.

Upon the trial it was stipulated that the following instrument was signed by defendant on December 5, 1961;

that the statements therein were voluntarily made by defendant; and that it should be marked as an exhibit and received in evidence without objection. This exhibit is in the handwriting of defendant and is as follows:

December 5, 1961.

> "I, Carl Stowe, received sums from the Mary Comer Estate as follows: $8950.00 from Darrell Timmons on November 9, 1960, and deposited it in my personal account at Bradford National Bank in Greenville, Illinois; $119.75 from Darrell Timmons, which I also deposited in my account; also $275.00 on June 4, 1960; and $70.00 in cash from Darrell Timmons. I put all of this money in my personal account and spent all of it for my own personal use. Nearly all of this money I used for the purpose of paying fines and fees on which I was delinquent. I used the money for that purpose knowing it to be wrongful and knowing it was a wrongful conversion of money that I held in trust. I withheld $400.00 as my attorney fees. I received a total of $700.00 attorney fees, $300.00 as attorney for the conservator, and $400.00 from the Mary Comer Estate. I paid out $175.00, $54.75, $340.00 and $41.00 on behalf of the estate. I have read the above and it is true and I acknowledge it to be true, no favors or promises having been made to me.
>
> /s/ CARL H. STOWE "

On December 9, 1961, the defendant was interrogated by the State's Attorney of Bond County at his office in Greenville, and at that time stated he was submitting to the examination voluntarily, in order that the truth be known, and in response to a question, "Did you

get some money from the Mary Comer Place?", replied: "I received a check for $8950.00 in November, 1960, while I was state's attorney. Orien Osborne made a check payable to Darrell Timmons, my client. Darrell endorsed this check in blank to me. I took this check and deposited it to my personal account. With this check I paid nearly all the finances that I owed the county. I didn't have enough to pay them all." He then went on to say that this money belonged to the heirs of Irene Comer and detailed how he and his wife expended it, in payment of his and their obligations.

Darrell Timmons testified that in August, 1959, he consulted Carl H. Stowe, the defendant, who was state's attorney of Bond County, with offices in Greenville, Illinois; that he employed him as his attorney and thereafter defendant informed him that he, Timmons, had been appointed administrator of the estate of Irene Comer, who had died several years before, leaving Lucian Comer, Maude Israelson, Helen Boller, Minnie Voetz, Clarence Comer, Donald Timmons, Thelma Horner, Inez Albro and Darrell Timmons as her heirs at law her surviving; that the property of which Irene Comer died seized was located in Greenville and consisted of a dwelling house and thirteen lots; that this property was subsequently sold and the proceeds of

the sale was evidenced by a check for $8950.00 , which check was delivered to defendant about November 8, 1960 by Timmons, who directed defendant to deposit it in the Bradford National Bank in Greenville in his, Timmons, name as administrator; that defendant agreed to do so; that about the first of June, 1961, Timmons ascertained that he had never been appointed administrator of the estate, that the proceeds of the sale of the Irene Comer property had not been deposited in the bank in his, Timmons, name, but had been deposited to the credit of defendant. Mr. Timmons further testified that thereafter defendant admitted to him that he had used the money for his individual purposes.

Roger Riedman testified that he was Cashier of the Bradford National Bank at Greenville, Illinois, and had been employed by the bank since 1933 and became Cashier in 1951; that, as Cashier he had custody and control of the accounts, ledgers and records of the bank, and that they are kept under his direction, control and management. Without objection, he identified the original check drawn by Mrs. Osborn, People's Exhibit No. 4, for $8950.00, and stated that it bore the endorsement of defendant, and that the records of the bank disclosed that it had been deposited to the account of the defendant. He also produced the

original ledger of the bank and identified People's Exhibits 6 and 7, being the original ledger sheets of defendant's account with the bank. The objection made to the admission in evidence of these exhibits was that no proper foundation had been laid for their admission, and that "these documents were hearsay." The objection was overruled, and these ledger sheets were admitted in evidence. The record or abstract does not indicate that these objected-to exhibits were read to the jury. The record does disclose that the only objected-to exhibit which went to the jury was People's Exhibit No. 9, being the original deposit slip evidencing the deposit of tne $8950.00 check in defendant's account, which defendant testified was what occurred.

The defendant, in his own behalf, testified that he had been practicing law since 1954 and was state's attorney of Bond County in 1959; that in July of that year he was employed by Darrell Timmons to represent him in connection with the appointment of a Conservator for Clarence Comer, an uncle of Darrell Timmons. He identified the $8950.00 check and stated it was brought to his office by Glen Wilson and Frank Nicholson; that since 1954, he had an account in the Bradford National Bank, and that this check was received by him from Darrell Timmons, and that he, the defendant, deposited it to his personal account in the Bradford National

Bank. This check was dated November 8, 1960. It was drawn by Mrs. O. V. Osborne, payable to the order of Frank Nicholson, agent, bears the endorsement of the payee, and also the endorsement of Darrell Timmons and the defendant, and was paid by the bank on which it was drawn, and the proceeds credited to the joint account of defendant and his wife, June Stowe. On cross-examination, the defendant testified that Mr. Timmons told him to deposit the check in the Bradford Bank, but did not tell him to put it in his own personal account. He further testified that he was holding the proceeds of this check for Mr. Timmons and the other heirs of the Irene Comer estate, but did not give Mr. Timmons the money because he didn't have it, as he had checked the money out on fines and fees to the county; that he paid his own personal debts with this money, and that he had no permission from Mr. Timmons to spend the money as he did.

It is first insisted that there is a variance between the charge in the indictment and the evidence produced on the trial, in that some of the counts of the indictment charged that defendant embezzled the property of Darrell Timmons in a certain amount and of a stated value, while the testimony is to the effect that the proceeds of this check was the property of the heirs of Ireme Comer. The

evidence, however, is that Darrell Timmons was one of the heirs of Irene Comer, and that he was custodian of the check and the fund it represented. It further appears that he had rightful possession of the check, and was entitled to its proceeds as a part owner thereof and as the agent of all the other parties who had any interest therein. Special ownership, or interest in, or possession of property is sufficient to prove ownership as against a party charged with the larceny of such property. (The People vs. Fitzgerald, 297 Ill. 264, 269).

The exhibits which it is insisted were improperly admitted in evidence are People's Exhibits 6, 7, 8 and 9. Exhibits 6 and 7 are the original ledger sheets of defendant's account at the Bradford National Bank and were produced at the trial by Mr. Riedman, the cashier of this bank, whose testimony in connection therewith is herein set forth. Exhibit 8 was carbon copies of deposit slips evidencing deposits made by defendant in this bank, which were credited to his personal account between July 25, 1960 and November 21, 1961. Exhibit 9 is the deposit slip dated November 9, 1960, evidencing the deposit in defendant's personal account of the $8950.00 check. The only objections made to these exhibits were that no proper foundation had been laid for their admission,

and that "they were hearsay." Considered with all the other evidence found in this record, the trial court did not err in overruling these objections and admitting these exhibits in evidence.

It is also insisted that the trial court erred in refusing to give to the jury the fourteenth instruction tendered by defendant. This instruction told the jury "that before the jury was warranted in finding a verdict of guilty as to any one of Counts 1, 2, 4, 5, 7, 8 and 9 of the indictment, you must be convinced from all the evidence beyond a reasonable doubt that the property converted to the use of the defendant was the property of Darrell Timmons, and not the property of any other person. If the jury believe from the evidence that the property described in the indictment as being the property of Darrell Timmons, was not the property of Darrell Timmons, you should find the defendant not guilty as to each of Counts 1, 2, 4, 5, 7, 8 and 9 of the indictment."

The record shows that at the conclusion of all the evidence, the Court, on motion of the State's Attorney, entered an nolle prosequi order as to Counts 8 and 9, as well as Counts 3, 6 and 10 of the indictment. Therefore, this instruction, as tendered, was properly

refused.

In People vs. Greben, 352 Ill. 582, it was held reversible error to refuse a somewhat similar instruction but all that was proper in this instruction was covered by other given instructions. The facts in the Greben case were not analogous to the facts in the instant case and all the evidence is that Darrell Timmons had rightful possession of the property which the indictment charged defendant embezzled.

It is also insisted that the court erred in giving to the jury the following instruction for the People: "The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant was performing the duties of an agent or solicitor of Darrell Timmons, or Darrell Timmons, Lucien H. Comer, Maude Israelson, Minnie F. Voetz, Helen Boller, Inez Albro, Thelma Horner, Donald Timmons and Clarence Comer, and that as such agent or solicitor came into possession, by virtue of his agency or solicitorship, of the check or funds stated in the indictment, belonging to such principals or clients, and that the defendant intentionally embezzled or fraudulently converted such check or funds to his own use, then you may find the defendant guilty."

Counsel's objection to this instruction is that "it is confusing and prejudicial, and permitted the jury to find the defendant guilty even if they believed the property embezzled belonged to heirs above named." When this instruction was being considered, at the conclusion of all the evidence, at the court's conference on instructions, the record discloses that counsel for defendant said: "I would like to show an objection to this. For one reason, it does not refer to all the counts. By 'nolle prossing' Counts 8 and 9, the counts of agent or solicitor, I think we are getting into a circular situation, when it says the defendant intentionally embezzled or fraudulently converted. There is no definition of what is meant by intentionally embezzled, and I think this instruction would be confusing to the jury." The court would have been justified in refusing this instruction, but in view of the record, it cannot be said that the jury was misled or confused thereby, and it was not reversible error to give it.

In support of his contention that defendant has been placed in jeopardy twice for the same offense, counsel states that the indictment returned by the grand jury on May 29, 1962, made identical charges against the defendant that were made in the indictment previously returned on January 9, 1962. Counsel concedes that the law is that

when a defendant of his own motion obtains a new trial, he may again be tried on the same indictment, but in the instant case, the second trial was had upon an indictment returned after the nolle prosequi order had been entered in connection with the indictment he was originally tried upon. Counsel insists that if this practice and procedure is approved, "there would be no end to the harassment a defendant might be exposed to if a state's attorney is permitted to nolle pros an indictment after verdict." In support of this argument, counsel refers to the constitutional provision which provides that "no person shall-------be twice put in jeopardy for the same offense." (Constitution of Illinois, Art. II, Sec. 10).

In Gannon vs. The People, 127 Ill. 507, it appeared that the defendant had been indicted for murder, tried, convicted and his punishment fixed at fourteen years. This verdict, upon motion of the defendant, was set aside and a new trial granted. Subsequently, another grand jury returned a new indictment and the second trial took place under this new indictment. In affirming the judgment of the trial court following the second trial, the Supreme Court, in the course of its opinion, said: (p. 522) " If a new trial be granted, on the defendant's application, this is, in itself, no bar to a second trial on the same

or an amended indictment." The court cited Wharton's Criminal Pleading and Practice and then quoted from State v. Blaisdell, 59 N. H. 328 where it is said "the verdict was set aside, on motion of the respondent for the misconduct of a juror. The trial was illegal and went for nothing, and the second trial was not a second jeopardy". So, in the instant case the verdict of the jury, following the first trial upon the indictment which was returned on January 9, 1962, found the defendant guilty of embezzlement, but it was vacated and set aside on motion of the defendant. Furthermore Article 3, sec. 4 (d) of the present Criminal Code, disposes of this contention of double jeopardy adversly to defendant's contention.

It is also insisted that this judgment should be reversed because James E. Buchmiller, prosecuted this case as state's attorney of Bond County and at the same time was acting as City Attorney of Greenville, Bond County, Illinois. These offices, suggests counsel, are incompatible, and being incompatible, Mr. Buchmiller must be held to have abandoned the office of State's Attorney when he accepted the office of City Attorney of the City of Greenville. In support of this contention, counsel cite People vs. Bott, 261 Ill. App. 261. What this case holds is that the same person cannot hold a judicial office, such as Police Magis-

trate, and an executive office, such as Town Clerk, at the same time. It does not hold that the office of State's Attorney and the office of City Attorney are incompatible, and we have found no authority which holds that this judgment is "null and void", as counsel suggests, because the State's Attorney, who conducted the prosecution of this case, was also acting as the City Attorney of Greenville.

The evidence of the guilt of this defendant is clear and convincing. No effort was made by the defendant to refute the charges preferred against him. In his written admission, in his confession, and by his testimony at the trial, defendant frankly stated that he was guilty of the offense with which he was charged, and of which he was convicted. The only finding consistent with the evidence was the verdict of guilty, which was returned by the jury, and this verdict, and the judgment based thereon, should not be disturbed by this court.

The judgment of the Circuit Court of Bond County is affirmed.

Judgment Affirmed.

Wright, J., concurs

Reynolds, J., concurs

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